

①
No. 89-7376-CFX
Status: GRANTED

Title: Pearly L. Wilson, Petitioner
v.
Richard Seiter, et al.

Docketed:
May 2, 1990

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Alexander, Elizabeth

Counsel for respondent: Adler, Allen P.

Entry	Date	Note	Proceedings and Orders
-------	------	------	------------------------

1	Apr 2 1990	G	Application (A89-689) to extend the time to file a petition for a writ of certiorari from April 16, 1990 to May 2, 1990, submitted to Justice Scalia.
2	Apr 3 1990		Application (A89-689) granted by Justice Scalia extending the time to file until May 2, 1990.
3	May 2 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	May 11 1990		Waiver of right of respondent Richard Seiter to respond filed.
6	May 16 1990		DISTRIBUTED. May 31, 1990
7	May 25 1990	P	Response requested -- JPS. (Due June 25, 1990)
8	Jun 22 1990		Brief of respondents Richard Seiter, et al. in opposition filed.
9	Jun 27 1990		REDISTRIBUTED. September 24, 1990
10	Jul 9 1990	X	Reply brief of petitioner Pearly L. Wilson filed.
12	Oct 1 1990		Petition GRANTED. *****
13	Nov 13 1990		Brief of petitioner Pearly L. Wilson filed.
15	Nov 13 1990		Brief amicus curiae of American Public Health Assn. filed.
18	Nov 13 1990		Joint appendix filed.
14	Nov 15 1990		Brief amicus curiae of United States filed.
16	Nov 23 1990		SET FOR ARGUMENT MONDAY, JANUARY 7, 1991. (4TH CASE)
17	Nov 27 1990		CIRCULATED.
19	Nov 30 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Dec 10 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
21	Dec 19 1990	X	Brief of respondents Richard Seiter, et al. filed.
22	Dec 19 1990	X	Brief amici curiae of Michigan, et al. filed.
23	Jan 2 1991	X	Reply brief of petitioner Pearly L. Wilson (rec. 12-30-90) filed.
24	Jan 7 1991		ARGUED.
25	Jan 7 1991		Record filed.
		*	USDC SD OH received-one volume.

1/28

(5)
No. 89-7376

Supreme Court, U.S.
FILED

NOW 13 1990

JOSEPH F. SPANOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1990

PEARLY L. WILSON,

Petitioner,

vs.

RICHARD SEITER, et al.,

Respondents.

On Writ Of Certiorari To the United States
Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

ELIZABETH ALEXANDER*
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
National Prison Project
of the American Civil
Liberties Union
Foundation
1875 Connecticut Ave.
N.W., #410
Washington, D.C. 20009
Telephone: (202) 234-4830
Counsel for Petitioner

GORDON J. BEGGS
ELINOR R. ALGER
ACLU of Ohio Foundation

*Counsel of Record

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio
RITA S. EPPLER*
Chief, Federal Litigation
Section
STEVEN W. RITZ
Assistant Attorney
General
State Office Tower
26th floor
30 East Broad Street
Columbus, Ohio
43266-0410
Telephone: (614) 466-5414
Counsel for Respondents

**PETITION FOR CERTIORARI FILED MAY 2, 1990
CERTIORARI GRANTED OCTOBER 1, 1990**

TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
FIRST AMENDED COMPLAINT	2
AFFIDAVIT OF ROBERT L. CASSIDY	10
AFFIDAVIT OF RICHARD GRIFFIN	15
AFFIDAVIT OF PRINCE VINSON	19
AFFIDAVIT OF PAUL BOCK	22
AFFIDAVIT OF JOSEPH E. KENNEDY	27
AFFIDAVIT OF PEARLY WILSON	32
AFFIDAVIT OF EVERETT HUNT, JR.	36
AFFIDAVIT OF HOMER FRIEND	40
AFFIDAVIT OF JERRY PATTON	43
AFFIDAVIT OF BENNETT MANNING	45
ATTACHMENT TO AFFIDAVIT OF BENNETT MANNING	47
DISTRICT COURT OPINION AND ORDER	53
DISTRICT COURT JUDGMENT	60
ORDER	61
COURT OF APPEALS OPINION	62
COURT OF APPEALS JUDGMENT	75
ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING CERTIORARI AND LEAVE TO PROCEED IN FORMA PAUPERIS, OCTOBER 1, 1990	76

RELEVANT DOCKET ENTRIES

Wilson, et al., v. Seiter, et al.

No. C2-86-1046

United States District Court, Southern District of Ohio,
Eastern Division

- 8-28-86 Motion by plaintiffs to proceed in forma pauperis
- 8-28-86 Motion to proceed in forma pauperis granted
- 8-28-86 Complaint, summons issued
- 8-28-86 Amended complaint
- 8-28-86 Petition for appointment of counsel by plaintiffs
- 11-10-86 Plaintiffs' motion for summary judgment
- 4-16-87 Defendants' cross-motion for summary judgment
- 5-18-87 Order granting defendants' cross-motion for summary judgment, judgment for defendants, action dismissed
- 5-18-87 Judgment entered
- 5-26-87 Motion of plaintiff Wilson for reconsideration
- 2-24-88 Order denying plaintiff Wilson's motion for reconsideration
- 3-2-88 Notice of appeal filed by plaintiff

Wilson, et al., v. Seiter, et al.

No. 88-3194

United States Court of Appeals for the Sixth Circuit

- 3-7-88 Appeal docketed
- 1-16-90 Judgment affirmed

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF OHIO, EASTERN DIVISION

Pearly L. Wilson

v.

Richard Seiter, et al.

Case No.

C-2-86-1046

FIRST AMENDED
COMPLAINT

I. PRELIMINARY STATEMENT

1. This is an action brought by two inmates at Hocking Correctional Facility at Nelsonville, Ohio (hereinafter HCF) to redress the violations of plaintiff inmates, constitutional rights under color of state law and authority. These violations include the general conditions of confinement, failure to implement an adequate inmates' classification system, failure to install an adequate ventilation system at HCF, failure to install an adequate heating system at HCF, warehousing of inmates, including the plaintiffs, at HCF, in overcrowded dormitories, with mentally ill inmates as well as with severely physically ill inmates while the Plaintiffs have no mental or physical infirmities whatsoever. Defendant's practices violate the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiffs seek appropriate declaratory and injunctive relief to correct these practices and damages to compensate plaintiffs for physical and mental injury.

II. JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C.A. Section 1343 (3) and (4) which give United States

District Courts original jurisdiction in suits brought pursuant to 42 U.S.C. Section 1983 to provide relief for the deprivation of civil rights under the color of state law.

3. Jurisdiction is also conferred on this Court by 28 U.S.C.A. Section 1331, which gives United States District Courts original jurisdiction in suits arising under the Constitution in which the matter in controversy exceeds ten thousand dollars. (\$10,000.00), exclusive of interest and costs. The amount here in controversy, exclusive of interest and costs, exceeds \$10,000.00.

4. Declaratory relief is authorized by 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

III. PARTIES

A. Plaintiffs

5. Plaintiff Pearly L. Wilson was convicted of a felony and now confined at HCF. Plaintiff Everett Hunt, Jr. was convicted of a felony and is now confined at HCF. Both plaintiffs have suffered, and are presently suffering under the conditions described in this action, and attempted to improve these conditions by advising the named defendants who, in turn, delegated their responsibilities to employees under them, (the defendants named herein). The delegated employees could not correct the violations complained of herein.

B. Defendants

6. Richard P. Seiter serves as Director of the Ohio Department of Rehabilitation and Correction. In that

capacity and pursuant to Section 5120.01 of the Ohio Revised Code, all functions and duties of all Managing Officers within the Department are performed under his control and pursuant to rules prescribed by him. He is being sued in his official capacity and in his individual capacity.

7. Carl Humphreys serves as the Managing Officer of the Hocking Correctional Facility, an institution under the Department's jurisdiction. Pursuant to Section 5120.38 of the Revised Code and in that capacity, Defendant Carl Humphreys is responsible for the day-to-day operation of HCF. He is being sued in his official capacity and in his individual capacity.

IV. STATEMENT OF FACTS

8. There are over 300 inmates at HCF, incarcerated for felonies, etc. The original intended maximum capacity was 200. Inmates are now being double-bunked in all three dormitories at HCF.

9. Inmates in "B" and "C" dormitories live with at least 141 and 143 other inmates respectively so that each inmate has less than [sic] 50 square feet of space. Each of the dormitories at HCF are seriously overcrowded. Inmates are subjected to cramped living space and excessive noise levels which create hardships in reading, writing, and studying. No attempt is made to regulate the noise level of fans, heaters in winter months, and dropping of footlocker tops by inmates.

10. Inmates are provided a stand-up locker and a foot locker for their personal possessions. This amount of

space is inadequate for keeping personal possessions; especially for those inmates, such as the Plaintiffs, who are serving lengthy sentences.

11. Inadequate heating in the winter months causes many problems. The "C" Dormitory, for instance, reaches nearly frigid temperatures. The clothing provided is not sufficient to keep the plaintiffs warm during the winter months.

12. Temperatures in summer months are excessively high because of improper ventilation. Inmates have problems with heat-related rashes, and those with respiratory deficiencies have difficulty breathing.

13. In each dormitory, the restrooms (toilets only) are inadequately cleaned and retains germs and offensive odors. The floor to these areas is slippery and always dirty, and not fitted to be anti-skid.

14. In each of the dormitories there are four (4) long sinks with three (3) spigots to each sink. These are used for tooth-brushing, washing, shaving, and washing clothes. These sinks are inadequately cleaned and retains germs and offensive odors. The floor around these areas are slippery and always dirty, and not fitted to be anti-skid.

15. The shower-heads, Fourteen (14) in "C" Dormitory, is the allotted showers for that Dormitory for 143 inmates.

16. There are twelve commodes and four urinals for "C" dormitory. These commodes and urinals are usually dirty and frequent accumulation of water around the urinals and commodes creates offensive odors and germs.

C. Classification

17. Inmates at HCF are classified for either minimum or medium custody pursuant to Rule 5120-9-52 & 53 of the Ohio Administrative Code. Assignment to individual dormitories, however, are based on no criteria or job assignments. Rather than factors like seriousness of the offense, length of sentence, nature of prior criminal conduct or other factors enumerated in Rule 5120-9-52, no criteria is utilized.

D. Dining Room and Food

18. The food services and facilities at HCF are a serious threat to the physical well-being of the plaintiffs as well as all other inmates. Offensive odors are a constant problem due to poor and inadequate ventilation, poor and inadequate sewage drainage, general filth and unsanitary facilities. Inmates working in the dining room are allowed to wipe tables with filthy rags and, this happens during the meals when eaten by the inmates.

Glasses of milk are left open for lengthy periods of time when the meals are served; although the milk dispenser is for the individual inmate to draw his own milk when he walks through the dining room, there is always an inmate assigned to draw the milk during the meals which, the inmate assigned, always draws far too many glasses of milk and leaves same sitting for flies and other insects to mingle or drink from the glasses. These open glasses of milk attract flies, roaches and vermin and, the general filth and unsanitary cleaning in the dining room contribute to patently offensive odors.

19. Inmates serving and preparing meals do not wear hair nets and do not have clean clothes or hands. Often the food itself contains hair, bugs and other foreign objects and is otherwise unsightly.

20. The plaintiffs have been subjected to less favorable living conditions, including less freedom, and, because of the mentally ill and physically ill inmates at HCF, a more dangerous environment and worse prison conditions; have incurred mental and physical stress; have lost property and unwritten seniority rights as a result of being transferred from the Chillicothe Correctional Institute at Chillicothe, Ohio, on May 16, 1983, and have suffered a loss of human dignity.

V. FIRST CAUSE OF ACTION

21. Plaintiffs repeat and reallege paragraphs one through twenty. Forcing the plaintiffs to live under the totality of conditions existing at Hocking Correctional Facility shocks the conscience and sense of decency of this society. These conditions subjects plaintiffs to deprivations and restrictions which bear no reasonable relationship to and are not necessary to the achievement of any legitimate corrective goals. By maintaining such practices and policies under color of state law, Defendants Seiter and Humphreys have violated Plaintiffs' Eighth and Fourteenth Amendment rights to be free from the imposition of cruel and unusual punishment.

VI. SECOND CAUSE OF ACTION
NEED FOR RELIEF

22. The policies and practices described in paragraphs one through twenty of this Amended Complaint have caused and are causing massive violations of basic human rights embodied in the United States Constitution. Plaintiffs have no adequate remedy at law. Plaintiffs are being substantially harmed, irreparably harmed, by the policies and practices of the Defendants. Plaintiffs will continue to be irreparably harmed until relief prayed for below is secured.

VII. DEMAND FOR RELIEF

WHEREFORE, Plaintiffs ask this Honorable Court to:

1. Declare that the actions of Defendants have violated and are violating the Constitutional rights of Plaintiffs Wilson and Hunt.
2. Issue an injunction ordering Defendants to forthwith discontinue the warehousing of mentally and physically ill inmates with the Plaintiffs.
3. Issue an injunction ordering Defendants to forthwith bring living conditions and practices up to constitutional standards, and to decrease the population at HCF to proper capacity, and to provide the Plaintiffs with more than 50 square feet of living space.
4. Award compensatory damages to each of the Plaintiffs in the amount of three hundred thousand dollars (\$300,000.00).

5. Award punitive damages in the amount of six hundred thousand dollars (\$600,000.00) to each Plaintiff in this Action.

6. Grant any other relief in law or equity that is just and proper, including but not limited to costs and reasonable attorney's fees, above and beyond the compensatory and punitive damages demanded as judgment against the named Defendants.

Respectfully submitted,

/s/ Pearly L. Wilson
(PEARLY L. WILSON) #146-097
HOCKING CORRECTIONAL
FACILITY
POST OFFICE BOX 59
NELSONVILLE, OHIO 45764

Pro se.

Respectfully submitted,

/s/ Everett Hunt Jr
(EVERETT HUNT, JR.) #125-268
HOCKING CORRECTIONAL
FACILITY
POST OFFICE BOX 59
NELSONVILLE, OHIO 45764

Pro se.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

AFFIDAVIT SUPPORTING CLAIMS
ALLEGED BY PLAINTIFFS PEARLY
WILSON AND EVERETT HUNT, JR.

I, /s/ Robert L. Cassidy, a citizen of the United States and of legal age, herein make the following statement in support of claims as raised in the lawsuit by the Plaintiffs, Pearly Wilson and Everett Hunt, Jr.

The statement is of my own free will, and of my own knowledge. I am competent to testify thereto.

I am a prisoner, an inmate situated within the State of Ohio, and at the Hocking Correctional Facility at Nelsonville, Ohio. I have been confined therein at that Facility (hereinafter "HCF") since July 1985.

The conditions at HCF, to my own personal knowledge are as follows:

1. The living areas are far too close in proximity to be healthy. Being that the beds are less than three to four feet (3-4) apart.
2. The ventilation is not adequate enough for proper breathing at any time even with the windows open during the summer months.
3. There are two large fans situated at the East and West ends of C-Dormitory, but neither fan, singularly, or collectively, are adequate enough to pull foul air out the dormitory and, therefore, the oxygen within the dormitory is not adequate for breathing at any time. In fact,

during the nights when every one is sleeping, the air turns so foul that it will awaken most of the inmates and in many cases cause these inmates to cough severally because of the lack of adequate ventilation. Body odors are rampant; dormitory cleanliness, and the lack of cleanliness is quite noticeable at all times. The air is stagnant.

4. Living space, such as the two (2) small lockers, is not adequate for those of us inmates who are serving lengthy sentences.

5. The prison officials have had a policy of housing both mentally ill and two physically ill inmates in C-dormitory. Many of the mentally ill inmates have most severe problems. Being caused to (or forced) to live with such prisoners causes stressful situations most times. It can only be deemed a punishment which courts have not imposed upon any particular inmate warehoused at HCF, because some of the mentally ill inmates are psychotic and, for my part, I do not know how to deal with any given situation if one should arise. As I do not know just how an angry psychotic inmate would act and, therefore, I have to stay away from such men in the dormitory at HCF whenever I am approached by one whom I would deem a mentally ill prisoner.

6. It is a policy at HCF that inmates transferred to HCF from another prison are assigned to the food service department without proper physical examinations or blood tests. Many of those inmates have lung diseases; they cough over foods where they are assigned to serve or prepare. Also, other inmates with lung diseases work in the dishwashing area, or the kitchen area even though

they are not assigned to prepare any foodstuffs whatsoever. But such diseased prisoners are not supervised in any capacity where it could safely be said that they are no threat to the other prisoners' health.

7. Cleaning equipment in C-Dormitory is not adequate; nor is the space for storing such equipment sufficient or clean, not with sufficient air to keep the foul odors to a minimum.

8. The noise level, that is, with fans running, and the general inmates' noise during the day or night even when sleeping, is far in excess of a proper level for a peaceful situation; whatwith the coughing of diseased inmates and the fans or heating equipment running.

9. C-Dormitory is a cold dormitory; it has damaged windows; damaged walls and, in many places, cracked walls where one can see right through the wall to the street down below in the Nelsonville populace or city proper; being that that city is situated too close to HCF.

10. In summer months the oxygen is just not there. One must suffer severely hot living quarters at times up to ninety-five (95) degrees temperature. I have been caused to suffer such hot temperatures since I have been confined at HCF, and the small fans, used at the time, were completely inadequate for ventilation.

11. The two (2) large exhaust fans currently situated in the East and West ends of C-Dormitory were not installed therein until July 23rd, and July 24th of 1986. The small stand-up fan was then removed from C-Dormitory on July 25th, 1986 and removed permanently.

12. Inmates are double-bunked at HCF in each dormitory.

13. Clothing for summer and winter months are ragged and inadequate. In fact, they claim not to have any underwear to issue to inmates at HCF.

14. Inmates being discharged from HCF are not provided proper clothing.

15. Inmates are allowed to wipe off tables in the dining room with dirty rags. These rags are so filthy that one with common sense would not permit same to be used for any purpose in the food service areas.

16. Inmates with lung diseases and other physical health problems are assigned to serve milk to other inmates coming into the dining room. Many times the milk sits out for long periods of time. I, too, have been served milk by prisoners with severe lung diseases; I, too, have observed milk sitting out open for long periods of time.

17. The air circulation is completely inadequate in the dining room at HCF during the summer months.

18. Fire exits are kept closed even during the hottest of days or nights, and these exits are locked at *all* times, except for a fire drill, even though there are "crash gates" situated in proper spots and there is not even one threat to security with the fire exits open.

19. I am aware of the pain and penalty for perjury and that any false statement that I make in the within

affidavit will subject me to penalty for perjury under laws of the United States.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Robert L. Cassidy
(AFFIANT)

[Jurat Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

AFFIDAVIT

I, RICHARD GRIFFIN, a citizen of the United States and of legal age, after first being duly cautioned and sworn to my oath, depose and say that I make the following statements in the within affidavit without expectation of gain or compensation of any kind. And that I have personal knowledge of the facts and circumstances regarding the conditions at the Hocking Correctional Facility at Nelsonville, Ohio (hereinafter "HCF"); and that the statement I make are [sic] true and correct and I am competent to testify thereto. I am aware of the pain and penalty for perjury and that I will be prosecuted for any false statement that I make in this affidavit under the laws of the United States. I therefore state that:

1. I am a prisoner confined at HCF, and have been confined at this Facility since May 1986. I am assigned to C-Dormitory.
2. Inmates are mostly double-bunked at HCF. There are at this time twenty-eight (28) single beds in C-Dormitory out of a total of one hundred forty-three (143) beds therein. Inmates in C-Dormitory have less than 50 square feet of space in which to live and maneuver [sic].

The dormitory is seriously over-crowded; as the beds are closely situated. In fact, when we are sleeping at night, we can and do smell other inmates' body odors because the air circulation is far below that required as habitable.

3. Inmates at HCF are subjected to not only cramped living quarters, but also, excessive noise levels created by the exhaust fans, and heater circulation fans, and coughing of other inmates caused mostly by the lack of adequate oxygen/air in which to breathe. (Many inmates at HCF have severe lung problems which cause them to cough all during the nights and days.) These noise levels create hardship in reading, writing, studying, sleeping or resting. When the fans are running it is impossible under the circumstances to regulate the noise level.
4. Inadequate heat in winter months causes C-Dormitory to reach near frigid temperatures.
5. The clothing provided to inmates at HCF is not sufficient to keep the men warm during winter months. Many have to stay under their bed covers in order to stay half-warm during the winter months.
6. We inmates are subjected to excessively high temperatures during summer months because of total lack of adequate or proper ventilation even with windows open. During these months numerous inmates have heat-related problems, and those inmates with respiratory problems have difficulty breathing. Some men have fell out because of exposure to excessive heat at HCF, and had to be placed in the prison infirmary for treatment.
7. I/we are housed with many inmates which have severe mental problems.
8. I/we are housed with many inmates at HCF that have severe medical problems such as open sores after major operations. This is because there is insufficient room to keep post-operative inmates in the infirmary, and they

must be returned to their respective dormitories almost immediately after they are returned to HCF from outside hospitals.

9. Inmates with lung diseases and severe respiratory problems are assigned to the Food Service Department without adequate physical examinations or blood tests, prior to being assigned to the food service areas. Many of these inmates are required to serve foods to other inmates and, during service thereof, the men who have these lung problems cough over the foods which they serve to myself and to other inmates as they/we come through the dining room during meals.
10. The urinals on C-Dormitory, and the commodes, because of accumulations of urine around these mentioned offensive odors and germs are created. Insufficient amounts of disinfect and detergents are provided for cleaning, and the procedures for cleaning are inadequate.
11. As a whole the food services and facilities as stated herein are a serious threat to the mental and physical well-being of inmates at HCF.
12. Because of the cracks in walls, and the holes used as prior ventilation outlets at HCF, insects are more than a nuisance [sic] at HCF during the warm weather. I.e., not only mosquitos [sic], but smaller insects and wasps and yellow jackets as well.
13. Windows are damaged to the point that 90 percent of these windows can not be opened nor closed unless the Maintenance Department is called. During rainy days and nights the windows cannot be closed and damp air is

the norm as result of failure to have such windows in operable condition.

14. Inmates assigned to the dining room are allowed to use filthy cloths for washing and wiping tables which inmates eat on. Offensive odors are a constant problem in the entire prison due to poor and inadequate ventilation.

15. Inmates in C-Dormitory have been required to hang wet towels and face cloths at heads of their beds even though there is insufficient ventilation to dry any cloth materials under 8 to 10 hours and, as a result of this requirement, very offensive odors are created not only in and around these areas, but also on the inmates' bodies and the cloth materials.

16. Fire doors are kept closed and locked at all times at HCF as exits from the dormitories even though there are situated at various proper places wire "crash gates" of heavy duty wire which cannot be bent without tools.

17. Floors in C-Dormitory are usually filthy and unhealthy because of the lack of proper cleaning materials and are threats to inmates' health and well-being.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Richard Griffin
(Affiant)

[Jurat Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]
AFFIDAVIT OF PRINCE VINSON

I, Prince Vinson, a citizen of the United States and of legal age, being of sound mind and having personal knowledge of the conditions under which I am at this time being subjected by the prison officials at the Hocking Correctional Facility at Nelsonville, Ohio (hereinafter "HCF") hereby make the following true and correct statements regarding these conditions. However, I make these statements without promise or expectation of monetary gain or other, but with the true intention of attempting to change all or most of these conditions under which I am constantly required to live as a prisoner of the State of Ohio at HCF. I therefore state:

1. I have been confined at HCF since December, 1984.
2. I am seventy-seven (77) years old at this time, and am physically ill.
3. The beds at HCF are far too close to be a healthful situation. We inmates have less than 50 square feet of living space.
4. Being closely situated, the body odors of other men sleeping nearby can be smelled at night because of the almost total lack of ventilation in C-Dormitory during hot or warm weather even though there are now two (2) large fans used for exhaust during those times as well as during winter months.

5. The two large fans, one on each end of C-Dormitory, are totally inadequate for ventilation, singularly or collectively. During the nights, the air turns quite foul and, in most cases, causes inmates to cough severely. Noises of the coughs of inmates keeps most inmates awake during the nights.

6. I am furnished two (2) small lockers in which to keep my personal property. Those lockers are not adequate for me or other inmates who have lengthy sentences. I am serving a lengthy sentence.

7. The prison policy at HCF is that inmates transferred to HCF from other prisons are usually assigned to the Food Service Department without proper examinations or blood tests. Many of these inmates have lung diseases but are assigned to the Food Service Department any way. They cough over the foods where they are assigned to either prepare or serve. Other inmates work in the dish-washing area. These diseased inmates are a serious threat to my health as well as other inmates' health.

8. C-Dormitory is a very cold dormitory during winter months. There are severely damaged windows, walls, and floor space which permits frigid air to enter into the dormitory during winter months. No adequate clothing is furnished inmates.

9. In C-Dormitory, I have been caused to suffer temperatures as high as ninety-five (95) degrees since I have been confined therein. The two large fans were installed in C-Dormitory, as I recall, on or about July 23rd, and July 24th of 1986; one at each end of the dorm.

10. Inmates are double-bunked at HCF in all three dormitories.

11. Inmates working in the dining room at HCF are allowed to use filthy rags for wiping off tables where the inmate population eats.

12. Fire exits are kept closed at all times, and locked, except for fire drills even though there are "crash gates" properly situated to prevent escape. There is no threat to security with the fire exits open during hot or warm weather months.

13. Because of the proximity of the toilets and latrine areas, one can smell the foul odors from urine, etc., even though these areas are cleaned daily.

I am aware of the pain and penalty for perjury. I know that I can and will be prosecuted for any false statement which I make in this Affidavit. The claims I have made in this Affidavit are true and correct and of my own personal knowledge and I am competent to testify thereto. FURTHER AFFIANT SAYETH NAUGHT.

/s/ Prince Vinson
(PRINCE VINSON)

[Jurat Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

AFFIDAVIT OF PAUL BOCK
Inmate Prison Number 183-164

I, PAUL BOCK, a citizen of the United States and of legal age, after first being duly cautioned and sworn to my oath, depose and say that the claims, allegations, and contentions I make in the within affidavit are true and correct and of my own personal knowledge and I am competent to testify thereto. Further, These claims I make are of my own free will and not because of promise of gain or expectation of gain or profit in any manner. I am aware of the pain and penalty for perjury and know that any false statement that I make in this affidavit will subject me to penalties under United States law for perjury. I therefore state:

1. I am a prisoner confined at the Hocking Correctional Facility ("HCF") at Nelsonville, Ohio. I have been confined at HCF since April 17, 1985. I am assigned to C-Dormitory, and have been so assigned to that dorm since I have been at HCF.
2. There are a total of one hundred and [sic] forty-three (143) beds in C-dorm; twenty-eight (28) of these beds are single; the rest are double-bunk beds.
3. We inmates at HCF have less than 50 square feet of space in which to live and maneuver [sic]; the dormitory is seriously overcrowded; and the beds are far too close for healthy living; being that many of the inmates have serious lung diseases and some have mental problems

which are also serious. When we sleep during warm weather we can and do smell other inmates' body odors.

4. We inmates are subjected to not only cramped living spaces, but also excessive noises and the levels of which creat [sic] hardship in reading, writing, studying, as well as sleeping and resting. There is no attempt to regulate the noise, nor has there ever been an attempt to regulate the noise levels which comes from heat and exhaust fans.
5. Inmates are provided with two (2) small lockers at HCF. These lockers are not adequate to store their personal possessions. These lockers are far too small for reasonable living space when one is serving a lengthy sentence. There is no other place at HCF for storing personal possessions.
6. Inadequate heating, to which I have been subjected, during the cold and winter months mostly reach frigid temperatures; I have been caused to suffer seriously due to the dormitory being very cold and damp. Nor are we inmates provided with clothes sufficient to ward off the cold, damp air during winter months.
7. Many of the inmates have to stay under the blankets on their beds in order to stay as warm as possible in the dormitories. Heat is definitely not working in C-dorm except in the center of the dorm by the toilet.
8. I have been exposed to temperatures as high as ninety-five (95) degrees at HCF since I have been confined therein. There has been inmates who have fell out because of heat exhaustion; others have heat rashes, and those with respiratory problems have difficulty just breathing.

9. I/we are housed with inmates who have been returned to HCF with open sores due to serious operations. These inmates are returned to their dormitory because the Inmate Health Clinic is far too small to accomodate [sic] recuperating space for inmates in the Infirmary.
10. Inmates with lung diseases are assigned to the Food Service Department even though they have not had physical examinations or blood tests. These inmates are routinely assigned to serve foods and do all the other job assignments which is called for in the Food Service Department.
11. I/we are housed with inmates who have severe and psychotic problems.
12. Because of the frequent accumulations of urine around the urinals in C-dorm, germs and offensive odors are created. Insufficient amounts of detergent and other cleaning materials are provided, and the procedures for exterminating insects and mice are totally inadequate.
13. Inmates in the work areas of the dining room are permitted to use filthy rags for cleaning tables off.
14. Ventilation in C-dormitory is not adequate; that dorm carries foul air which we inmates are required to breathe.
15. The walls and floors are cracked and frigid air comes right through these walls during winter months. Inmates are required to sleep with their heads toward the windows, where the frigid air comes through.
16. Many inmates are required to use their blankets at the head of their beds in order to stave off the frigid air.

Many times, the air is not only cold, but it is damp as well.

17. Dormitories at HCF *appear* to be a good living area for we prisoners; but the fact is, our health is in jeopardy, being that we are required to live so close to each other and breathe each other's body odors and foul breaths mostly during the nights.
18. Fire exist [sic] are kept closed and locked at all times even though there are "crash gates" situated which will prevent escapes, or access to outside areas.
19. The so-called "Unit Management" at HCF is a total loss of time and does not assist inmates in any manner. In fact, there are no qualified personnel to run Unit Management at HCF or, if there are qualified personnel, they do not assist inmates. Rather, they do more harm to the inmates that [sic] good. No one takes responsibility; no one knows what they should do in any given situation; they always refer an inmate to another department which, when so refered [sic], the inmates gets no results favoring him. Unit Management is a sham and a mockery to inmates.
20. Prison conditions at HCF involves the wanton and unnecessary infliction of physical and mental pain and stress upon myself and many other inmates at HCF. Such punishment is grossly disproportionate with or to the severity of the crimes warranting imprisonment. As I was sent to prison *as* punishment. Not *for* punishment.
21. Not only have prison officials been advised of the conditions which I complain of, they, in fact, have done nothing to alleviate the problems.

22. Unit Management has been asking for *more* beds to be placed in C-dorm. There is unavailable any room for other beds therein. We are grossly overcrowded at this time already. FURTHER AFFIANT SAYETH NAUGHT.

/s/ Paul Bock
(PAUL BOCK)

[Jurat Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

AFFIDAVIT

I, JOSEPH E. KENNEDY, a citizen of the United States and of legal age make the following statements in the within Affidavit without any expectation of compensation or promise of gain in any manner. I have personal knowledge of the facts and circumstances of the conditions at the Hocking Correctional Facility at Nelsonville, Ohio (hereinafter "HCF"); and the statements I make herein are true and correct, and I am competent to testify thereto. I am aware of the pain and penalty for perjury and know that any false statement I make herein will subject me to penalty for perjury under the laws of the United States. I therefore state that:

1. I have been confined at HCF as an Ohio prisoner serving a sentence since April, 1986. I am assigned to C-Dormitory.
2. Inmates are mostly double-bunked at HCF. However, there are, at this time, only twenty-eight (28) single beds in C-Dormitory; the rest of the beds are all double-bunks, all of which total to one hundred and forty-three (143) including the single beds therein.
3. Inmates in C-Dormitory at HCF have less than 50 square feet of space. The dormitory is seriously overcrowded; and the beds are very closely situated so that, when we sleep, we can smell the body odors of those other inmates around us as they too, are sleeping.

4. We inmates at HCF are subjected to cramped living space and excessive noise levels which create hardship in reading, writing, studying, and sleeping or resting. There is no attempt to regulate the noise level and, in fact, because of the exhaust fans, and the heater circulating fans, it is impossible to regulate the noise level in C-Dormitory. Nevertheless, B-Dormitory is also under like circumstances insofar as these conditions are stated herein, because that dorm is almost to the letter exactly like C-Dormitory.

5. Inmates are provided two (2) small lockers for their personal possessions. This amount of space is totally inadequate for keeping possessions, and especially inadequate for inmates who are serving lengthy sentences. There is no storage space elsewhere in HCF for safekeeping of inmates' personal possessions. None is forthcoming; and none will be provided.

6. Inadequate heating in winter months causes C-Dormitory to reach nearly frigid temperatures. The clothing provided inmates at HCF is not sufficient to keep the inmates warm during winter months. Many inmates have to stay under their bed covers in order to stay warm during the winter months.

7. Temperatures in summer months are excessively high because of the lack of proper and adequate ventilation. Inmates have problems with heat rashes, or heat-related rashes, and those with respiratory problems have difficulty breathing. There has been instances where inmates have fell out because of the excessive heat at HCF.

8. I/we are housed with inmates who have severe mental problems; many of whom are, or may be psychotic

and in need of psychiatric and psychological treatment which is not provided at HCF. At least not adequately.

9. I/we are housed with inmates at HCF who when returned from major operations from various outside hospitals, are placed in close proximity with us even though these inmates have open sores, unclean bodies, and cannot be cared for properly in the dormitories. They are released from the Infirmary at HCF because there is a total lack of space for inmates to recover from their serious operations in the Infirmary.

10. Inmates who have serious lung diseases are even assigned to the food service department at HCF. These inmates are not given adequate physical examinations or blood tests prior to being assigned to the food service department. There are many instances that inmates who have serious lung diseases, are assigned to serve foods to inmates coming through the dining room, and those inmates serving food are allowed to stand over such foods and cough right over the foods.

11. Because of the frequent accumulation of urine around the urinals and commodes, offensive odors are created and germs. Insufficient amounts of detergent and disinfect [sic] are provided for cleaning, and the procedures for exterminating bugs and the insects are totally inadequate. As a whole, the food services and facilities as herein stated create a serious threat to the mental and physical well-being of the inmates, including myself at HCF.

12. Inmates assigned to the dining room area are allowed to use filthy rags to clean wastes off the dining

room tables. Offensive odors are a constant problem due to poor and inadequate ventilation.

13. The dishwasher never adequately cleans trays or silverware.

14. Inmates in C-Dormitory have been required to hang wet towels and face cloths at the head of their beds to dry. But, due to the total lack of proper ventilation, these towels and face cloths do not dry under a period of eight (8) to ten (10) hours and, therefore, being required to hang same at heads of beds cause offensive odors not only in the bed areas, but also on inmates' bodies as well at [sic] the cloth materials.

15. Ninety-nine (99) percent of the inmates housed at HCF are well over fifty (50) years old. They are double-bunked just as if they were well under thirty (30) years of age, in similar circumstances.

16. I have been subjected to filthy air in C-Dormitory due to a lack of proper ventilation even with the two (2) huge exhaust fans placed in that Dormitory.

17. Windows in almost every area, and at least ninety (90) percent of those windows are damaged to the point that they can not be completely closed for the winter months, not opened during summer months except by the maintenance department.

18. The walls are cracked and the cold air comes right on through to the dormitory with frigid temperatures.

19. When it rains, if a window is open, it cannot be closed at night and beds are either wet, or damp air is the result.

20. Dormitories at HCF *appear* to be a good living area for prisoners; but the fact is their health is in more jeopardy than one might understand with untrained minds for the purpose of determining what is adequate or proper to be habitable.

21. During warm weather insects are far too many in the dormitories because of the totally opened areas that cannot be closed.

22. Fire exits remain *closed and locked* at all times except when a fire drill is held at HCF, even though there are "crash gates" situated in proper places to prevent escapes or access to other areas outside the dormitories.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Joseph E. Kennedy
(Affiant)

[Jurat Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

AFFIDAVIT OF PEARLY WILSON

I, PEARLY WILSON, a citizen of the United States and of legal age, make the following statement, presenting the material facts, personally known to me and I am competent to testify thereto:

1. I am a prisoner incarcerated at the Hocking Correctional Facility (HCF) at Nelsonville, Ohio. I have been confined at HCF since May 16, 1983.

2. I have been subjected to every inhumane, unconstitutional punishment in violation of the Eighth Amendment to the United States Constitution as set forth in my original Complaint and First Amended Complaint and I therefore incorporate, reallege and restate those same claims as set forth therein. I have suffered both mental and physical pain because of the named defendants' acts, under color of state law, or their failures to act when they had been duly advised and notified that wrongful acts were being heaped upon my person by their employees and themselves as well.

3. I forwarded a letter to Defendant Richard P. Seiter and Defendant Carl Humphreys, which consisted of three (3) pages, complaining of the unconstitutional conditions of confinement to which they, the defendants, were subjecting me to. That letter was dated July 8, 1986. (Exhibit Number 1, attached hereto).

3(a). At no time did Defendant Seiter respond to the complaints listed in my letter dated July 8, 1986, and

forwarded to him by certified letter Number P 678 311 646, received and signed for by Defendant Seiter's receiving agent, R. Campbell on July 14, 1986. (Exhibit Number 2)

3(b). Defendant Humphreys responded by letter dated July 14, 1986; but failed to take any responsible action to alleviate or correct the constitutional violations complained of by me and Plaintiff, Everett Hunt, Jr. Defendant Humphreys referred a copy of my letter to Mr. Freind [sic], HCF Unit Manager, and his staff. Mr. Freind [sic] could not, and did not take any action to alleviate or correct the constitutional violations as complained of, nor did any member of his staff. In fact, neither Mr. Freind [sic] or his staff has any power to correct the violations. (See Exhibit Number 3, certified letter receipt to defendant Humphreys), signed for by Melissa J. Purch, (Defendant Humphrey's receiving agent at HCF).

4. I have suffered mental pain because of the filth to which I have been subjected at HCF in the dining room during mealtimes, such as has been complained of in my original Complaint and Amended Complaint. In fact, It has been impossible for me to go to the dining room three (3) times daily for meals because of the filth to which I have been subjected and the diseased inmates assigned to prepare the foods for feeding to inmate population. I have a fear of contacting a communicable disease from eating such foods, etc. I still suffer mental pain.

5. I have been subjected to, and still being subjected to frigid air in C-dorm at HCF because of inadequate heat in the dorm, and it has been like thus since May 16, 1983. I have suffered mental and physical pain because of the

cold, frigid temperatured air in C-dormitory, and still suffer same at this time during cold weather.

6. George Sideris, #189-358, was taken to an outside hospital from HCF as a result of contacting pneumonia due to the frigid air in C-dorm, on October 27, 1986. He was then returned subsequently; and, again, returned to an outside hospital on November 1, 1986, because of problems with his contracted pneumonia.

7. I have been subjected to very high temperatures at HCF since being incarcerated there and, at times, temperatures as high as ninety-five (95) degrees.

8. I have been, and am still being, warehoused with mentally ill inmates at HCF.

9. Ventilation is totally inadequate for a healthy environment [sic] at HCF, and I have been subjected to that unhealthy environment since May 16, 1983 or thereabouts . . . such as smelling other inmates' body odors; smelling the foul air and odors from men with colostomy bags housed in C-dorm; smelling the foul odors caused by the toilets and urinals situated in C-dorm; being situated far too close to other beds, far too close for a healthful situation; noises coming from heat and exhaust fans in C-dorm; being subjected to so-called "Unit Management" personnel who have no actual qualifications and cannot assist inmates in any manner. Or, if Unit Management personnel are qualified, they refuse or fail to assist inmates; choosing to refer inmates to other departments instead of being able to handle the problems they are faced with by inmates. In fact,

10. Unit Management personnel have requested more beds be placed in C-dorm even though C-dorm is already overcrowded., and,

11. Even though the ventilation is totally inadequate, Unit Management has even requested that cubicles be installed in C-dorm; knowing well that with cubicles installed, the ventilation will be next to zero if not totally zero and unhealthy for the inmates as confined therein, as it has been all along.

12. Even though C-dorm appears to be clean, it is not.

13. We inmates are subjected to insects and dangerous bugs at HCF, such as wasps and yellow jackets; roaches; mice. Extermination is totally inadequate. Mosquitos and spiders are rampant at HCF because of the many, many cracked walls, floors, and open areas of doors, etc., as well as the huge fans used for exhaust in the dormitories, and their open areas, without lubbers.

14. I am aware of the pain and penalty for perjury and that any false statement I make in thia [sic] Affidavit will subject me to penalty for perjury under the laws of the United States Constitution and the statutes thereof.

DATE: __, 19 __

/s/ Pearly Wilson
(Affiant)

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

AFFIDAVIT OF EVERETT HUNT, JR.

I, EVERETT HUNT, JR, a citizen of the United States and of legal age, make the following statement, presenting the material facts, personally known to me and I am competent to testify thereto:

1. I am a prisoner incarcerated at the Hocking Correctional Facility (HCF) at Nelsonville, Ohio. I have been confined at HCF since May 16, 1983.

2. I have been subjected to every inhumane, unconstitutional punishment in violation of the Eighth Amendment to the United States Constitution as set forth in my original Complaint and First Amended Complaint and I therefore incorporate, reallege and restate those same claims as set forth therein. I have suffered both mental and physical pain because of the named defendants' acts, under color of state law, or their failures to act when they had been duly advised and notified that wrongful acts were being heaped upon my person by their employees and themselves as well.

3. I forwarded a letter to Defendant Carl E. Humphreys and Defendant Richard P. Seiter, which consisted of three (3) pages, complaining of the unconstitutional conditions of confinement to which they, the defendants, were subjecting me to. That letter was dated July 13, 1986.

3(a). At no time did Defendant Seiter respond to the complaints listed in my letter dated July 13, 1986.

3(b). Defendant Humphreys responded by letter dated July 15, 1986; but neglected to take any responsible action to alleviate or correct the constitutional violations complained of by me and Plaintiff, Pearly Wilson. Defendant Humphreys referred a copy of my letter to Mr. Friend, HCF Unit Manager, and his staff. Mr. Friend could not, and did not take any action to alleviate or correct the constitutional violations as complained of, nor did any member of his staff. In fact, neither Mr. Friend or his staff has any power to correct the violations.

4. I have suffered mental pain because of the filth to which I have been subjected at HCF in the dining room during mealtimes, such as has been complained of in my original Complaint and Amended Complaint. In fact, it has been impossible for me to go to the dining room three (3) times daily for meals because of the filth to which I have been subjected and the diseased inmates assigned to prepare the food for feeding the inmate population. I have a terrible fear of contacting a communicable disease from eating such food, etc. I still suffer mental pain.

5. I have been subjected to, and still being subjected to frigid air in B-dorm at HCF because of inadequate heat in the dorm, and it has been like this since May 16, 1983. I have suffered mental and physical pain because of the cold, frigid temperatured air in B-dormitory, and still suffer same at this time during cold weather.

6. George Sideris, #189-358, was taken to an outside hospital from HCF as a result of contacting pneumonia due to the frigid air in C-dorm, on October 27, 1986. He was then returned subsequently; and, again, returned to

an outside hospital on November 1, 1986, because of problems with his contracted pneumonia.

7. I have been subjected to very high temperatures at HCF since being confined here and, at times, temperatures as high as ninety-four (94) degrees.

8. I have been, and am still being, warehoused with mentally ill inmates at HCF.

9. Ventilation is totally inadequate for a healthy environment at HCF, and I have been subjected to that unhealthy environment since May 16, 1983 or thereabout . . . such as smelling other inmates' body odors; smelling the foul air and odors from men with colostomy bags housed in B-dorm; smelling the foul odors caused by the toilets and urinals situated in B-dorm; being situated far too close to other beds, far too close for a healthful situation; noises coming from heat and exhaust fans in B-dorm; being subjected to so-called "Unit Management" personnel who have no actual qualifications and cannot assist inmates in any manner. Or, if Unit Management personnel are qualified, they refuse or fail to assist inmates; choosing to refer inmates to other departments instead of being able to handle the problems they are faced with by inmates. In fact,

10. Unit Management personnel have requested more beds be placed in B-dorm even though B-dorm is already overcrowded., and,

11. Even though the ventilation is totally inadequate, Unit Management has even requested that cubicles be installed in B-dorm; knowing well that with cubicles installed, the ventilation will be next to zero if not totally

zero and unhealthy for the inmates as confined therein, as it has been all along.

12. Even though B-dorm appears to be clean, it is not.

13. We inmates are subjected to insects and dangerous bugs at HCF, such as wasps and yellow jackets; roaches; and mice. Extermination is totally inadequate. Mosquitos and spiders are rampant at HCF because of the many, many cracked walls, floors, and open areas of doors, etc., as well as the huge fans used for exhaust in the dormitories, and their open areas, without lubbers.

14. I am aware of the pain and penalty for perjury and that any false statement I make in this Affidavit will subject me to penalty for perjury under the laws of the United States Constitution and the statutes thereof.

DATED: November 6, 1986

/s/ Everett Hunt, Jr.
Affiant

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO : SS.
COUNTY OF HOCKING : AFFIDAVIT OF
: HOMER FRIEND

I, Homer Friend, being first duly sworn, hereby state that I have personal knowledge of all the facts contained in this Affidavit, that I am competent to testify to the matters stated herein and that the following is true to the best of my knowledge and belief.

1. I am the Unit Manager at the Hocking Correctional Facility.

2. I have been employed at the Hocking Correctional Facility since 1983 when it was initially opened as a correctional facility.

3. I am personally familiar with the conditions of confinement at HCF since 1983.

4. There are currently 327 inmates at HCF, with 141 and 143 inmates housed in two large dormitories, and 46 housed in the honor dormitory.

5. Because inmates are housed in open dormitories, special measures are taken to keep down the noise level: 1) radios are only permitted with earphones; 2) no televisions are permitted in the dormitory; 3) a special television room is separate from the dormitory; 4) dormitory rules prohibit excessive noise; and 5) guards are instructed to keep down noise.

6. Each inmate is given one foot locker and one wall locker.

7. There have been very few complaints about the amount of storage space, and it appears to be adequate for most inmates.

8. The heaters have been recently serviced, and they are in good working order.

9. The dormitories are adequately heated during the winter.

10. Inmates are not given special winter clothes unless they have jobs which require them to be outside.

11. Inmates are permitted to buy winter clothing to wear such as long underwear.

12. Inmates are given an extra blanket in the winter.

13. Two large exhaust fans have been installed in each dormitory to increase ventilation and keep down the heat in the summer.

14. The majority of windows are in working order, and they are opened in the summer.

15. The restrooms are completely cleaned twice per day, and porters clean them throughout each day as needed.

16. The kitchen area and dining room are cleaned after every meal.

17. There are currently 57 inmates who work in the kitchen and make sure that it is clean and sanitary.

18. The kitchen and dining areas are kept very clean every day.

19. HCF has contracted with an exterminator, Wells Pest Control, and the institution is exterminated twice per month.

20. Inmates who work around food have to wear hats to keep hair out of food, and they are required to wear plastic gloves.

21. Every inmate is given a health screening during his initial reception into the prison system, and inmates are examined when they enter HCF.

22. Since HCF opened in 1983, there have been no outbreaks of contagious diseases.

23. Inmates with mental illness problems are sent out of HCF to either Oakwood Forensic Center or the Techumseh Program at Chillicothe Correctional Institute.

24. Mentally ill inmates are not "warehoused" at HCF.

25. Because there is an older population at HCF, some inmates have age-related health problems.

26. Physically ill inmates are not "warehoused" at HCF, but the Department does place older inmates within the system at HCF for their own safety among other reasons.

/s/ Homer Friend
HOMER FRIEND

[Jurat Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO : SS.
COUNTY OF HOCKING : AFFIDAVIT OF
: JERRY PATTON

I, Jerry Patton, being first duly sworn, hereby state that I have personal knowledge of all the facts contained in this Affidavit, that I am competent to testify to the matters stated herein, and that the following is true to the best of my knowledge and belief.

1. I am the Health Care Administrator at Hocking Correctional Facility (HCF).

2. All inmates confined at this institution were medically examined upon their reception in the Ohio prison system.

3. The initial medical examination including checking the inmates for contagious diseases such as tuberculosis, hepatitis [sic], etc.

4. Based upon the initial medical screenings of the inmates, I can state that there are no inmates at HCF with active contagious diseases that can be transmitted.

5. There have been no outbreaks of contagious diseases at HCF since it was converted into a prison in 1983.

6. With regard to the food service, inmates and prison employees eat the same food prepared in the same kitchen.

7. The health clinic at HCF has had no cases of food poisoning such as Salmonella or Botulism.

8. When floors are cleaned at HCF, signs are put up to indicate that the floors are wet and to use caution.

9. With regard to heat in the summer, there are no medical records of any inmates being overcome by heat.

10. In the winter, the number of colds and cold-related diseases is no higher than normal for inmates in this age group.

11. I have reviewed the medical file for Pearly Wilson and find that he has only been treated for routine health problems since 1983.

12. Inmate Wilson has complained of cold symptoms on two occasions since 1983, and both times he was treated with over-the-counter medications.

13. I have reviewed the medical file for Everett Hunt, Jr., and find that he has only been treated for routine health problems since 1983.

14. Inmate Hunt has complained of cold symptoms on twelve occasions since 1983, but he only required treatment with over-the-counter medications on every occasion.

Further, affiant sayeth not.

/s/ Jerry Patton
JERRY PATTON

[Jurat Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO : SS.
COUNTY OF FRANKLIN : AFFIDAVIT OF
: BENNETT MANNING

I, Bennett Manning, being first duly sworn, hereby state that I have personal knowledge of all the facts contained in this Affidavit, that I am competent to testify to the matters stated herein.

1. I am an attorney practicing with a private law firm in Columbus, Ohio.

2. In October, 1986, I was employed as staff counsel for the Ohio Judicial Conference.

3. On October 23, 1986, I toured the Hocking Correctional Facility with Assistant Attorney General Frederick Schoch.

4. I toured the institution to prepare an article for "Judicial Notice", a newsletter distributed to all Ohio judges.

5. Based upon my personal observations of the Hocking Correctional Facility, I prepared the article.

6. A copy of the article which I prepared is attached to this Affidavit.

7. The article has not yet been published in "Judicial Notice".

8. To the best of my knowledge and belief, the article gives a true and accurate account of what I observed in my tour of Hocking Correctional Facility.

Further affiant sayeth not.

/s/ Bennett Manning
BENNETT MANNING

[Jurat Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HOCKING CORRECTIONAL FACILITY TOUR

By: Bennett A. Manning

Last week I had the opportunity to tour the Hocking Correctional Facility at Nelsonville, Ohio. The facility, a former tuberculosis hospital built in 1956 and converted to a medium security prison in 1980, houses about 300 male inmates in three "dorms" or floors. I was the guest of a lawyer from the Ohio Attorney General's Office investigating a complaint filed by one of the inmates dealing with "conditions" existing at the facility.

All visitors must empty their pockets and walk through a metal detector before being admitted to the prison. The contents of all visitors' pockets are inspected. (I had a cassette tape in my coat pocket, and the guards refused to let me take it inside the prison. "What would you want to smuggle a tape in for?" one asked me. The tape was returned after the tour. I don't know if they played it or not; if they did, they heard Rickie Lee Jones' first album and some cuts from the Broadway musical "New York, New York.")

The prison itself seemed reasonably secure - the locks were large and the wire mesh heavy on all gates, and the facility was surrounded by twelve foot wire mesh fences laced with a high-tech version of barbed wire called "razor wire." I looked at the stuff pretty closely, and those barbs really are like razor blades. Our guide told us that once someone gets entangled in the stuff they have to be cut out or the situation just gets worse. There

have only been three escapes from Hocking Correctional since the facility opened: one inmate escaped in a laundry truck and two more placed blankets over the razor wire and climbed a fence before the fences were raised from eight to twelve feet.

Once inside, I was immediately struck by how clean the facility was and by how much freedom the inmates had within the facility. The first room we were shown was the prison visitation room, which exhibited both of these features. Far from the wire cages, bulletproof glass and tiny windows I expected, the visitation room was an open area that looked like a snack lounge at a high school or (not surprisingly) a hospital. The door to the room was open and inmates appeared to be free to associate with visitors and each other once inside. There were vending machines along one wall and a number of card-table-sized tables. The wall opposite the vending machines featured large windows which overlooked a small courtyard. Four people (an inmate and his visitors, I presume) were using one of the tables to play cards. The tile floor was aging but spotless.

Speaking of age, the average age of an inmate at Hocking Correctional is 45 years old. Eligibility to be placed in a medium security facility such as Hocking is based on a rating system which assigns point values to certain prisoner attributes such as age, prior record, whether the prisoner is likely to commit further offenses, and so forth. Prisoners whose point totals are in a certain range are declared to be "medium security" material. Our guide was unable to tell me what kinds of crimes Hocking inmates had committed, but the lawyer from the

attorney general's office recognized one individual whom he knew had been found guilty of embezzling.

The dorms where the inmates sleep are nothing more than huge rooms with long rows of bunk beds placed about three feet apart. Each inmate gets two "lockers" to stow personal possessions; one is a trunk placed near the foot of each bunk and the other is a more conventional high-school type locker, except much shorter – about three feet high. Inmates are permitted to have radios with earphones in the dorm area, but not televisions. Sink, toilet and shower facilities are located along one wall of each dorm. A three foot half-wall separates the shower/restroom area from the sleeping area. Again, everything was very clean and well kept up.

Inmates are awakened each day by a buzzer at 6:00 AM. The buzzer also sounds at several predetermined intervals throughout the day for "count." Inmates must report to their bunks at these times so prison officials can keep track of them. Otherwise, the inmates are left to their own devices. Activities include watching T.V. (yes, they have cable – with HBO), taking exercise in the gym or yard, using the pool (as in billiards, not swimming) and weight room and reading in the prison library. About 100 Hocking inmates are involved in continuing education classes supervised by a prison director of education.

These and other privileges available to the inmates are used as "carrots" to keep them on their best behavior. This incentive system is useful because it makes inmates feel like there's something in it for them if they obey the rules and don't cause trouble. Before a privilege is taken away, the inmate involved may request a "trial" held

before three prison officials at which each side is allowed to present its case. There are five "solitary confinement" cells for severe discipline problems.

A recent innovation at Hocking is a so-called "unit management" system, designed to help solve inmate problems and deal with inmate complaints at an individual instead of an institutional level. Each dorm is staffed with three professionals, including a case manager (social worker) and a prison official. These professionals are available to consult with inmates, without appointment, for about twelve hours every day, including Saturday and Sunday. Inmates are encouraged to bring all kinds of problems to the unit staff, whether of a personal or institutional nature. The idea is to provide immediate attention to inmate concerns, thus preventing little problems from smoldering until they become big ones. Previously, inmates with problems had to file a complaint or make an appointment which might not bring results for days or weeks.

For example, under the old system, one inmate complained that his shoes didn't fit properly. It took a week to go through the proper channels and get a pair of shoes that fit. That might not seem like a big problem, our guide told us, "but if you were given a pair of shoes that didn't fit, you'd be pretty mad; and if you had to wait a week to get shoes that did fit, you'd be pretty mad about that, too." Under unit management, these types of problems will in theory be remedied more quickly. (Often, things that aren't perceived as big problems by the prison staff *are* big problems to the inmates.)

Prison officials told us that unit management, which has been used successfully in the federal prison system for years, has been initially almost too successful at Hocking; inmates, they said, "are in there [the unit management office] all the time" to lodge trivial or insignificant complaints. Officials hope that the number of complaints will decrease once the novelty of the new system wears off.

What trip to a prison would be complete without sampling the food? We stayed for lunch, which is the big meal of the day. For 85¢, we got chicken fried steak (a 1/4" piece of meat (beef, I think) dipped in batter and fried in chicken fat; it tasted terrible), mashed potatoes with gravy (OK as instant potatoes go), cooked cabbage (I didn't eat any, but it looked alright), three bean salad (out of a can, tasted fine), two slices of bread with butter, vanilla pudding (very tasty) and coffee or milk. The portions were more than generous. A restaurant critic would have panned the meal so fast it wouldn't have time to cool off, but this isn't the Maisonette . . . or even Howard Johnson's, for that matter. Put it this way: you could survive on the food, but I wouldn't try to get locked up so I could eat it on a regular basis.

What does all this have to do with Ohio judges. Just this: Since the Revised Code usually allows broad discretion in sentencing guilty defendants, it is important to know what kind of facility you are sentencing defendants to. Only then can available discretion be used most effectively. Judges should therefore strive to become familiar with the various detention facilities both within their jurisdiction and around the state. Further, this familiarity should be renewed on a regular basis, because conditions

and facilities change. (For example, within the next year Hocking Correctional will be expanding to accommodate more inmates and will receive a new heating system.)

Of course, this is not meant to imply that you ought to knock two years off (or add two years to) a sentence based on the quality of the food served at a particular institution, or that conditions at some or all of our prisons violate constitutional prohibitions against cruel and unusual punishment, but knowledge of prison conditions could be helpful in a number of sentencing situations. For example, if you are considering granting a motion for shock probation with respect to a particular defendant, it would be helpful to know what kind of "prison experience" the defendant will be subjected to prior to release. Youthful or older offenders may be better suited to some types of prison environments than others. Some detention facilities are more secure, or have better medical facilities, or are cleaner, or more crowded, or better staffed, or more accommodating to visitors than others.

In other words, it behooves any responsible judge to have at least some idea about the type of confinement to which he or she is sentencing people. Most prison officials will gladly permit you to inspect their facilities if given proper notice. These opportunities should not be wasted.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

OPINION AND ORDER

Plaintiffs, Pearly Wilson and Everett Hunt, Jr., are prisoners at the Hocking Correctional Facility (HCF). They bring this action pursuant to 42 U.S.C. §1983 claiming that the conditions of confinement at HCF deny them their constitutional rights in violation of the Eighth and the Fourteenth Amendments to the United States Constitution. This matter is before the Court on defendants' motion for summary judgment.

Plaintiffs allege cruel and unusual punishment due to

the general conditions of confinement, failure to implement an adequate inmates' classification system, failure to install an adequate ventilation system at HCF, failure to install an adequate heating system at HCF, warehousing of inmates, including the plaintiffs, at HCF, in overcrowded dormitories, with mentally ill inmates as well as with severely physically ill inmates while the Plaintiffs have no mental or physical infirmities whatsoever.

(Amended Complaint). Specifically, plaintiffs claim that they are housed in an overcrowded facility with inadequate space for storage of personal possessions, inadequate heating in the winter, improper ventilation all year, and unsanitary restroom, shower and sink areas. Plaintiffs allege that no criteria is utilized in assigning inmates to dormitories. Plaintiffs claim that the food services and

facilities are health hazards due to inadequate ventilation, sewage drainage, improper maintenance procedures, and unsanitary practices and procedures.

Plaintiffs claim that as a result of being subjected to such conditions of confinement they have and do suffer both mental and physical stress and have lost unwritten seniority rights.

Defendants move for summary judgment on the ground that plaintiffs are provided with the minimal civilized measure of life's necessities as required by *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Defendants offer as support for their motion the affidavits of Homer Friend, Unit Manager at HCF, Jerry Patton, Health Care Administrator at HCF, and Bennett Manning, staff counsel for the Ohio Judicial Conference.

Federal Rule of Civil Procedure 56(c) provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, 4757 (June 25, 1986) (No. 84-1602) (emphasis in original); *Kendall v. The Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984).

The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial, . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 467 (1962); accord, *County of Oakland v. City of Berkley*, 742 F.2d 289, 297 (6th Cir. 1984).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (footnote omitted); accord, *Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1455-56 (6th Cir. 1984), cert. denied, 469 U.S. 1062, (1985).

As we noted in our Order of February 20, 1987, the Eighth Amendment prohibits cruel and unusual [sic] punishment. "The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency . . . We have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving society.'" *Estelle v. Gamble*, 429 U.S. 97, 102; see, *Rhodes v. Chapman*, 452 U.S., at 346 (1981); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1120 (M.D. Tenn. 1982). The Eighth Amendment requires that a State furnish inmates with reasonably adequate food, clothing, shelter, sanitation, medical care and personal safety. See, *Newman v.*

Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Grubbs v. Bradley*, 552 F.Supp., at 1122. Conditions of confinement must be contrary to "evolving standards of decency" before they violate the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101 (1957)(plurality opinion). Although "conditions which standing alone would not be cruel or unusual, might become so when viewed in the context of the total prison environment," it remains the case that "unless there are conditions that, considered either alone or in combination, specifically amount to cruel and unusual punishment, there can be no Eighth Amendment violation." *Grubbs v. Bradley*, 552 F.Supp. at 1122. Eighth Amendment requirements are met if prisoners are provided with a minimal civilized measure of life's necessities. *Rhodes v. Chapman*, 452 U.S., at 347. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . ." *Whitley v. Albers*, 54 U.S.L.W. 4236, 4239 (U.S. March 4, 1986) (No. 84-1077).

With this standard in mind, and after a thorough review of the record presented to the Court, including the affidavits of Homer Friend, Bennett Manning, and Jerry Patton, we HOLD that the conditions of which plaintiffs complain do not amount to cruel and unusual punishment. These conditions exhibit no obduracy or wantonness on the part of prison officials.

The Constitution does not mandate comfortable prisons. *Rhodes v. Chapman*, 452 U.S., at 349. "So long as prison officials provide inmates with 'a minimal civilized measure of life's necessities', the requirements of the

Eighth Amendment have been met." *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) (quoting, *Rhodes v. Chapman*, 452 U.S., at 347).

Regarding the lack of a classification system in assigning inmates to dormitories, a prison's internal security is a matter normally left to the discretion of prison administrators. *Rhodes v. Chapman*, 452 U.S., at n. 14. See also, *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Although plaintiffs complain that there are mentally ill inmates housed with them, prisons house persons convicted of serious crimes and "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S., at 347. Plaintiffs present no evidence that these circumstances inflict wanton pain upon plaintiffs or that such conditions are grossly disproportionate to the severity of the crimes warranting plaintiffs' imprisonment. *Id.*, at 348.

In addition, defendants present affidavits which indicate that mentally ill inmates are sent to either the Oakwood Forensic Center or to the Tecumseh Program at the Chillicothe Correctional Institute.

As to plaintiffs' complaint that they are housed with severely physically-ill inmates, defendants present affidavits which state that there are no HCF inmates with active contagious diseases. In fact, there have been no outbreaks of contagious diseases at HCF since it was converted into a prison in 1983. Plaintiffs do not complain that they have contracted any such disease.

Defendants present affidavits tending to show that the restrooms are cleaned at least twice a day and precautions are taken to keep the facilities and food in as sanitary a condition as possible. It must be remembered that HCF houses 327 inmates. Measures are taken to keep noise levels to a minimum; heaters have been recently serviced and are in good working order; exhaust fans have been installed in each dormitory and most windows can be opened; kitchens and dining areas are cleaned after every meal and those who work around food are required to wear hats and gloves; HCF contracts with an exterminator to keep the institution free of vermin. Consequently, it is clear that prison officials take steps to keep HCF as clean and sanitary as possible.

Plaintiffs allege that the dormitories are overcrowded. There are two dormitories ("huge rooms with two rows of bunks about three feet apart") housing 141 and 143 inmates. However, the inmates are not confined to the dormitories during the day. Recreational facilities and a TV room are available to dormitory inmates. Although crowded (plaintiffs allege each inmate has less than 50 square feet of space), plaintiffs have not countered defendants' affidavits with evidence which would support their claim that conditions in the dormitories amount to cruel and unusual punishment.

As for the issue of inadequate personal storage space, plaintiff Wilson has previously litigated this issue in this Court and was denied relief. *See, Wilson v. Seiter*, No. C-2-83-2311 (S.D. Ohio August 17, 1984), *aff'd.*, (6th Cir. March 7, 1985). Consequently, the Court need not discuss this claim.

In sum, the Court HOLDS that plaintiffs have been provided with at least the minimal civilized measure of life's necessities and have not been deprived of their Eighth Amendment right to be free from cruel and unusual punishment. We HOLD that HCF officials do not demonstrate obdurate or wanton behavior regarding the conditions of HCF.

Defendants' motion for summary judgment is hereby GRANTED. This action is DISMISSED.

The Clerk of Court shall enter judgment for defendants.

/s/ James L. Graham
James L. Graham, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

[Captioned Omitted In Printing]

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-2-86-1046

* * *

x **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendants motion for summary judgment is **GRANTED**, this action is **DISMISSED**, JUDGMENT is for the defendants.

May 18, 1987
Date

KENNETH J. MURPHY
Clerk

/s/ Beverly J. Robinson
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption Omitted In Printing]

Civil Action C-2-86-1046

ORDER

Plaintiff's May 26, 1987 motion for reconsideration is DENIED. In issuing the May 18, 1987 Opinion and Order dismissing this case the Court considered the affidavits of Pearly Wilson, Everett Hunt, Jr., Robert L. Cassidy, Prince Vinson, Richard Griffin, Paul Bock, and Joseph E. Kennedy attached to plaintiff's November 10, 1986 motion for summary judgment. These affidavits do not, when considered with the March 16, 1987 affidavit of Jerry Patton and the March 16, 1987 affidavit of Bennett Manning, create any conflict of material fact requiring trial. Although plaintiffs' affidavit conclusorily asserts that severely mentally ill and physically ill inmates are present at HCF, they filed no affidavits to rebut Mr. Patton's sworn statement that severely mentally ill inmates receive treatment outside the institution, inmates are treated for physical illness, and that there have been no outbreaks of contagious diseases since the prison opened. Plaintiffs similarly failed to offer fact specific affidavits or other evidence to rebut defendants' affidavits concerning food, sanitation, noise, heat and other conditions at the prison.

/s/ James L. Graham,
James L. Graham, Judge
United States District Judge

No. 88-3194
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PEARLY WILSON, et al.,)	
Plaintiffs-Appellants,	)	ON APPEAL
v.	)	from the United
	)	States District
RICHARD SEITER, ET AL.,	)	Court for the
Defendants-Appellees.	)	Southern
	)	District of Ohio
)	

Decided and Filed January 16, 1990

Before KRUPANSKY and WELLFORD, Circuit Judges, and HARVEY, Senior District Judge.*

HARVEY, Senior District Judge. Appellants are inmates at Hocking Correctional Facility (HCF), a medium security prison located in Nelsonville, Ohio. On August 28, 1986, appellants filed a complaint in the United States District Court for the Southern District of Ohio, claiming violations of the cruel and unusual punishments clause of the eighth amendment of the United States Constitution. The claimed violations arose from

*Honorable James Harvey, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

allegedly unfit confinement conditions; specifically overcrowding, excessive noise, inadequate storage, inadequate heating and cooling, unclean lavatories, improper classification of prisoners, and unsanitary eating conditions.

On cross-motions for summary judgment, appellants and appellees filed affidavits in support of their respective positions. Appellants' affidavits, and those of five additional inmates, essentially recite the alleged conditions of confinement as depriving them of their eighth amendment rights. Moreover, the affidavits of inmates Bock, Wilson, and Hunt contend that they contacted prison officials regarding the pertinent conditions, but that the officials took no action in response thereto.

Appellees' affidavits, filed both in response to appellants' summary judgment motion and in support of their own summary judgment motion, basically disclose efforts taken by prison personnel regarding physical and medical conditions within HCF, and partially refute the appellants' specific claims concerning conditions at the prison. Additionally, appellees filed the affidavit of the staff counsel for the Ohio Judicial Conference, containing an article recounting his observations following a tour of the facility, respecting conditions at HCF.

In granting appellees' motion, the district court initially found that the eighth amendment requires states to furnish inmates with reasonably adequate food, clothing, shelter, sanitation, medical care and personal safety. Next, the district court noted that appellants, in order to prove an eighth amendment violation arising from conditions of

confinement, must demonstrate "obduracy and wantonness, not inadvertence or error in good faith" on the part of the prison officials. *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Reviewing all of the affidavits in light of these standards, the district court concluded that appellants failed to establish a genuine issue of material fact, and that judgment should properly enter in appellees' favor as a matter of law. Briefly, the trial court concluded that the complained-of conditions exhibited no obduracy or wantonness on the appellees' parts. Furthermore, the district court examined each complained-of condition discretely, and in several instances found appellants' claims meritless given appellees' affidavits. Particularly, the district court dismissed averments in appellants' supporting affidavits concerning confinement with physically-ill inmates, cleanliness of lavatories, noise levels, heating and cooling, ventilation, eating conditions, and general sanitation on the strength of contrary information contained in appellees' affidavits.

Appellants now contend that the district court improperly granted the appellees' summary judgment motion, in that genuine issues of material fact exist concerning confinement conditions, and that therefore the district court could not, as a matter of law, enter judgment.

I.

District courts may enter summary judgment in a movant's favor upon a showing that "there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant need not, however, "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (emphasis in original).

"As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once materiality of a fact is established, district courts must determine whether a genuine issue regarding that fact exists in the record. In order to demonstrate the genuineness of any issue of material fact, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to [that] material fact[]." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, "[i]f the evidence [regarding existence of a genuine issue of material fact] is merely colorable, . . . , or is not significantly probative, . . . , summary judgment may be granted." *Anderson*, 477 U.S. at 249-250. Finally, "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 587, quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

II.

Appellants argue that genuine issues of material fact remain regarding confinement conditions at HFC [sic], urging that the district court improperly weighed the affidavits of appellees against those of appellants in concluding that the confinement conditions did not violate appellants' eighth amendment rights. Clearly, confinement conditions are material given the substantive law surrounding eighth amendment prisoner claims. See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1982). Moreover, appellants' affidavits are more than colorable, and obviously place the conditions surrounding confinement in issue. Several circuits have found eighth amendment violations arising from conditions similar to those alleged by the appellants. See, e.g., *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), cert. denied, 479 U.S. 317 (1986); *Cody v. Hillard*, 799 F.2d 447, Reh'g granted (en banc), 804 F.2d 440 (8th Cir. 1986); *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985). To the extent, therefore, that the district court adopted the findings in appellees' affidavits in concluding that the HFC's [sic] confinement conditions did not deprive appellants of their eighth amendment rights, the district court committed error. As stated in *Anderson*, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249.

III.

Nevertheless, the appellants' affidavits, even if unopposed, may be insufficient to support a claimed eighth

amendment violation. We are able to identify eight specific conditions that appellants assert amount to infliction of cruel and unusual punishment: (1) unsanitary eating conditions; (2) inadequate heating and cooling; (3) housing with mentally ill inmates; (4) housing with physically ill inmates; (5) inadequate ventilation; (6) excessive noise; (7) insect infestation; and (8) overcrowding. Since appellees' affidavits refute, to some degree, appellants' claims concerning these conditions, genuine issues of fact exist regarding same. Our task, then, is to determine whether these issues are material, requiring an examination of the substantive law regarding eighth amendment confinement conditions claims.

Rhodes, supra, sets forth a flexible standard for ascertaining whether prison conditions amount to cruel and unusual punishment. In evaluating prison conditions, we recognize that the eighth amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 346, (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). Thus, "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." *Id.* at 347. Yet, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional," and "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Id.*

Subsequent to *Rhodes*, this circuit had interpreted its language as requiring an examination of "all the prison's

conditions and circumstances, rather than isolated conditions and events, when addressing eighth amendment claims." *Walker v. Mintzes*, 771 F.2d 920, 925 (6th Cir. 1985). Moreover, "[i]n certain extreme circumstances the totality itself may amount to an eighth amendment violation, but there still must exist a specific condition on which to base the eighth amendment claim." *Id.* Specific conditions found to violate the eighth amendment include the denial of adequate access to shower facilities, *Preston v. Thompson*, 589 F.2d 300 (7th Cir. 1978); denial of medical treatment, *Estelle v. Gamble*, 429 U.S. 97 (1976); overcrowding, *Cody v. Hillard*, 799 F.2d 447 (8th Cir. 1986); threats to safety, *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986); vermin infestation, *Hoptowii v. Spellman*, 753 F.2d 779 (9th Cir. 1985); inadequate lighting, *id.*; inadequate ventilation, *id.*, unsanitary eating conditions, *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); and housing of inmates with known dangerous individuals, *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985).

Application of this precedent to the appellants' allegations leads us to conclude that some, but not all, of the complained-of conditions suggest the type of "seriously inadequate and indecent surroundings" necessary to establish an eighth amendment violation. See *Birrell v. Brown*, 867 F.2d 956, 958 (6th Cir. 1989). Concerning, however, appellants' claims regarding inadequate cooling, housing with mentally ill inmates, and overcrowding, we believe that these allegations, even if true, fail to establish constitutionally violative conditions.

First appellants suggest that their exposure during summer months to temperatures as high as 95 degrees

represents cruel and unusual punishment. Undeniably, excessive exposure to heat may in some instances constitute cruel and unusual punishment, yet we are unaware of any precedent holding that occasional exposure to 95 degree heat presents such an instance. We therefore reject this specific condition as a basis for appellants' claim.

Second, appellants contend that appellees' practice of housing mentally ill inmates in their dorm places them in fear for their safety. Appellants do not, though, cite any particular episodes of violence supporting this fear. In *Shrader, supra*, the court accepted a magistrate's finding that

[o]ne key to understanding when the risk of violence reaches constitutional dimensions is its effect on the inmate population. . . . In this context, it is not necessary that an inmate establish that he has been the subject of an actual attack, but he must establish that he lives in *reasonable* fear of assaults from other inmates . . . and that the fear results in significant mental pain. . . .

761 F.2d at 978, 979 (emphasis added). The appellants present solely subjective feelings as a basis for their alleged fear of violence from mentally ill inmates. While *Shrader* does not mandate that a prisoner, to establish an eighth amendment violation, demonstrate that he has been the victim of an actual attack, it does require *reasonable* fear. The absence of allegations of prior physical violence involving any inmate supporting appellants' claims leads us to conclude that their fear is not reasonable. Their eighth amendment claim cannot therefore rest on allegations of improper housing of mentally ill inmates.

Finally, on the issue of overcrowding, appellants cite to the fact that inmates are double-bunked, and that each receives approximately 50 square feet of living space within the dorm. While overcrowding is generally acknowledged as a potential basis for an eighth amendment violation, courts examining this problem review all of the circumstances surrounding confinement to ascertain whether prison population density inflicts cruel and unusual punishment. See *Rhodes*, 452 U.S. at 348-49; *Cody*, 799 F.2d at 449-50; *French*, 777 F.2d at 1252. If conditions impacting upon the quality of confinement exacerbate an already overcrowded condition, cruel and unusual punishment may exist. The record before us, undisputed by appellants, establishes that while the inmates may indeed have only 50 or so square feet of living space each within their dorm, the inmates also have access during the day to a television lounge, gymnasium, yard, weight room, billiards table, and library. This is not, therefore, a situation wherein the inmates allege constant exposure to overcrowding. We therefore reject any eighth amendment claim on this basis.

Having found that appellants' claims cannot arise from specific conditions of inadequate cooling, housing with mentally ill inmates, and overcrowding, we now examine whether the remaining conditions alleged are adequate to sustain the appellants' claim.

IV.

Appellees argue that even if appellants allege conditions adequate to support an eighth amendment claim, their affidavits fail to refute the evidence contained in

appellees' affidavits of conscious efforts taken by prison officials concerning the relevant conditions. Since the Supreme Court, in *Whitley v. Albers*, *supra*, has directed that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause," 475 U.S. at 319, appellees urge that the absence of facts rebutting evidence indicating efforts taken to assure minimally decent confinement conditions demonstrates an absence of any genuine issue as to this material fact.

Initially, it is noteworthy that we have applied *Whitley's* "obduracy and wantonness" standard to eighth amendment challenges to confinement conditions. In *Birrell v. Brown*, 867 F.2d 956 (6th Cir. 1989), we noted that "[i]n addition to producing evidence of seriously inadequate and indecent surroundings, a plaintiff must also establish that the conditions are the result of recklessness by prison officials and not mere negligence or oversight." *Id.* at 958. The importance of this application of *Whitley* may be merely semantic, yet it establishes that at least in this circuit, the *Whitley* standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.

Having concluded that a showing of obduracy and wantonness is material to appellants' claims, the critical, and determinative, question becomes whether appellants' affidavits place this fact in issue. Resolution of this question necessitates an examination of whether such affidavits, although not placing appellants' state of mind squarely in issue, nevertheless imply the conduct required under *Whitley*. That is, could "a fair-minded

jury . . . return a verdict for [appellants] on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.

We are aware that state of mind is typically not a proper issue for resolution on summary judgment. See 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2730 (1983); *Archer v. Dutcher*, 733 F.2d 14 (2d Cir. 1984); *Slay v. Alabama*, 636 F.2d 1045, *reh'g denied*, 642 F.2d 1210 (5th Cir. 1981). Appellees contend, however, that the appellants' failure to present any evidence directly refuting appellees statements suggesting affirmative efforts to maintain habitable conditions at HCF demonstrates that no genuine issue of fact exists regarding these efforts. Moreover, appellees assert that such efforts evidence a lack of the requisite "obduracy and wantonness" necessary for an eighth amendment claim.

Appellees' argument, although logically attractive, ignores the well-established principle that upon a motion for summary judgment, all reasonable inferences from underlying facts must be drawn in the nonmovant's favor. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Furthermore, "[i]nasmuch as a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ - a function traditionally left to the jury - summary judgment often will be an inappropriate means of resolving an issue of this character." Wright, Miller & Kane, *supra*, at § 2730, p. 238 (footnote omitted). The question we must address, therefore, is whether the appellants' affidavits, while not directly contradicting the appellees' affidavits, nevertheless contain facts reasonably implying that the appellees acted with obduracy and wantonness.

Importantly, the appellants do not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions. Rather, appellants' complaints are aimed at the results of those efforts. The undisputed record indicates that the HCF unit manager has adopted specific affirmative measures to reduce noise levels, has had heaters serviced, provides inmates with an extra blanket during winter months, has installed exhaust fans for improved ventilation, requires the cleaning of lavatories and kitchen on a daily basis, and has contracted with an exterminator to treat HCF for pests on a twice-monthly basis. The appellants' position, apparently, is that despite these actions, prison conditions remain unacceptable.

Rhodes and its progeny make clear that confinement conditions may constitute cruel and unusual punishment only if such conditions "compose the punishment at issue." 452 U.S. at 347. Nothing in the appellants' affidavits implies that the appellees used confinement conditions to punish the appellants. To the contrary, the evidence shows action on the appellees' behalf to maintain decent conditions at HCF. Additionally, the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior. At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim. See *Birrell, supra*, at 958.

V.

In conclusion, we find that appellants' allegations regarding inadequate cooling, housing with mentally ill inmates, and overcrowding are insufficient to provide a specific basis for an eighth amendment violation. Additionally, we find that appellants' affidavits, in that they fail to raise a reasonable inference of obduracy and wantonness on the appellees' behalf, present no genuine issue as to that material fact. Thus, we hold that the district court properly entered summary judgment in appellees' favor, and therefore AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-3194

PEARLY WILSON and EVERETT HUNT, JR.,
Plaintiffs-Appellants,
v.

RICHARD SEITER and CARL HUMPHREYS,
Defendants-Appellees.

Before: KRUPANSKY and WELLFORD, Circuit Judges;
and HARVEY, Senior District Judge.

JUDGMENT

ON APPEAL from the United States District Court
for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from
the said district court and was submitted on briefs with-
out oral argument.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this court that the judgment of
the said district court in this case be and the same is
hereby affirmed.

No costs taxed.

January 16, 1990

ENTERED BY ORDER OF THE
COURT

Leonard Green, Clerk
/s/ Leonard Green
Clerk

SUPREME COURT OF THE UNITED STATES

No. 89-7376

Pearly L. Wilson,

Petitioner

v.

Richard Seiter, et al.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be, and
the same is hereby, granted.

October 1, 1990

NOV 13 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

PEARLY L. WILSON,
v. *Petitioner,*

RICHARD SEITER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF PETITIONER

ELIZABETH ALEXANDER *

DAVID C. FATHI

ALVIN J. BRONSTEIN

MARK J. LOPEZ

NATIONAL PRISON PROJECT

OF THE AMERICAN CIVIL

LIBERTIES UNION FOUNDATION

1875 Connecticut Ave., N.W., #410

Washington, D.C. 20009

(202) 234-4830

GORDON J. BEGGS

ELINOR R. ALGER

ACLU OF OHIO FOUNDATION

1223 West 6th Street

Cleveland, OH 44113

(216) 781-6278

JOHN A. POWELL

STEVEN A. SHAPIRO

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION

132 W. 43rd Street

New York, NY 10036

(212) 944-9800

Counsel for Petitioner

* Counsel of Record

48 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying the "malicious and sadistic" intent requirement of *Whitley v. Albers*, 475 U.S. 312 (1986), to Eighth Amendment challenges to continuing conditions of confinement that do not involve the use of force.

2. Whether the court of appeals erred in affirming the trial court's grant of summary judgment in view of the factual conflicts in the record.

LIST OF PARTIES

The petitioner Pearly L. Wilson is a prisoner at the Hocking Correctional Facility (hereinafter "HCF") in Nelsonville, Ohio. Everett Hunt, Jr., a second plaintiff in the lower courts, is no longer confined at the HCF. The respondents are Richard P. Seiter, Director of the Ohio Department of Rehabilitation and Corrections in Columbus, Ohio, and Carl Humphreys,* Superintendent of the HCF.

* The current Superintendent is Carole Shiplevy.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	8
ARGUMENT	11
I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN <i>WHITLEY v. ALBERS</i>	11
II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S EMPHASIS ON OBJECTIVE CRITERIA FOR DETERMINING WHETHER THE EIGHTH AMENDMENT HAS BEEN VIOLATED	20
A. Under <i>Rhodes</i> , Continuing Conditions of Confinement Are to be Judged by Objective Criteria	20
B. Legislative Policies Challenged Under the Eighth Amendment Do Not Require an Inquiry into State of Mind	24
C. Continuing Conditions Violating the Eighth Amendment Standard in <i>Rhodes</i> Necessarily Involve at Least Deliberate Indifference	25
D. Conclusion	29

TABLE OF CONTENTS—Continued

	Page
III. THE GRANT OF SUMMARY JUDGMENT WAS ERROR	30
A. Under a Correct Legal Standard, Factual Disputes Precluded Summary Judgment.....	30
B. The Petitioner's Affidavits Either Challenge the Existence of the Claimed Remedial Efforts or Challenge the Claim that the Remedial Efforts Had Any Significant Impact upon Conditions	32
C. An Eighth Amendment Violation Cannot Be Cured by Ineffectual Remedial Efforts.....	34
IV. THE COURT OF APPEALS ERRED IN DISMISSING CERTAIN OF PETITIONER'S CLAIMS	36
CONCLUSION	40

TABLE OF AUTHORITIES

CASES	Page
<i>Albro v. County of Onondago, N.Y.</i> , 627 F.Supp. 1280 (N.D.N.Y. 1986)	39
<i>American Foreign Service Ass'n v. Garfinkel</i> , 109 S.Ct. 1693 (1989)	31
<i>Berry v. City of Muskogee</i> , 900 F.2d 1489 (10th Cir. 1990)	17, 18
<i>City of Canton, Ohio v. Harris</i> , 109 S.Ct. 1197 (1989)	27
<i>City of Mesquite v. Aladdin's Castle</i> , 455 U.S. 283 (1982)	35
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	21
<i>Cortes-Quinones v. Jimenez-Nettleship</i> , 842 F.2d 556 (1st Cir. 1988), <i>cert. denied</i> , 109 S.Ct. 68 (1988)	19, 38, 39
<i>DeMallory v. Cullen</i> , 855 F.2d 442 (7th Cir. 1988) ..	38
<i>DeShaney v. Winnebago County DSS</i> , 109 S.Ct. 998 (1989)	26
<i>Dudley v. Stubbs</i> , 109 S.Ct. 1095 (1989) (mem.)	14
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	<i>passim</i>
<i>Evans v. Dugger</i> , 908 F.2d 801 (11th Cir. 1990)	20
<i>Foulds v. Corley</i> , 833 F.2d 52 (5th Cir. 1987)	15, 16
<i>Gates v. Collier</i> , 501 F.2d 1291 (5th Cir. 1974)	22, 23
<i>Gillespie v. Crawford</i> , 833 F.2d 47 (5th Cir. 1987), <i>mod.</i> , 858 F.2d 1101 (5th Cir. 1988) (en banc) (per curiam)	16
<i>Graham v. Connor</i> , 109 S.Ct. 1865 (1989)	28
<i>Hoptowit v. Ray</i> , 682 F.2d 1237 (9th Cir. 1982)	29
<i>Howard v. Adkison</i> , 887 F.2d 134 (8th Cir. 1989) ..	17, 26
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	10, 36
<i>Inmates of Allegheny County Jail v. Pierce</i> , 612 F.2d 754 (3d Cir. 1979)	29
<i>Inmates of Occoquan v. Barry</i> , 717 F.Supp. 854 (D.D.C. 1989)	59
<i>Jones v. Diamond</i> , 594 F.2d 997 (5th Cir. 1979)	39
<i>LaFaut v. Smith</i> , 834 F.2d 389 (4th Cir. 1987) ..	15, 18, 19
<i>Langley v. Coughlin</i> , 715 F.Supp. 522 (S.D.N.Y. 1989)	38, 39
<i>Morgan v. District of Columbia</i> , 824 F.2d 1049 (D.C. Cir. 1987)	18
<i>Noll v. Carlson</i> , 809 F.2d 1446 (9th Cir. 1987)	19

TABLE OF AUTHORITIES—Continued

	Page
<i>Ort v. White</i> , 813 F.2d 318 (11th Cir. 1987)	14
<i>Powell v. Lennon</i> , 914 F.2d 1459 (11th Cir. 1990) ..	20
<i>Pugh v. Locke</i> , 406 F.Supp. 318 (M.D.Ala. 1976), aff'd as modified, 559 F.2d 283 (5th Cir. 1977), rev'd in part, 438 U.S. 781 (1978)	22
<i>Ramos v. Lamm</i> , 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)	22, 28
<i>Reece v. Gragg</i> , 650 F.Supp. 1297 (D.Kan. 1986) ..	39
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	passim
<i>Rogers v. Evans</i> , 792 F.2d 1052 (11th Cir. 1986) ..	29
<i>Rummel v. Estelle</i> , 445 U.S. 263 (1980)	21
<i>Shrader v. White</i> , 761 F.2d 975 (4th Cir. 1985)	38
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	14, 15, 27
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	24
<i>Stanford v. Kentucky</i> , 109 S.Ct. 2969 (1989)	24
<i>Stubbs v. Dudley</i> , 849 F.2d 83 (2d Cir. 1988)	14
<i>Tillery v. Owens</i> , 719 F.Supp. 1256 (W.D.Pa. 1989), aff'd, 907 F.2d 418 (3d Cir. 1990)	37, 39
<i>Todaro v. Ward</i> , 565 F.2d 48 (2d Cir. 1977)	29
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	24
<i>United States v. Oregon State Medical Society</i> , 343 U.S. 326 (1952)	34
<i>Weems v. United States</i> , 217 U.S. 349 (1910)	24
<i>Wellman v. Faulkner</i> , 715 F.2d 269 (7th Cir. 1983)	29
<i>West v. Atkins</i> , 108 S.Ct. 2250 (1988)	26
<i>Whitley v. Albers</i> , 475 U.S. 312 (1986)	passim
<i>Williams v. Edwards</i> , 547 F.2d 1206 (5th Cir. 1977)	22, 23
<i>Wilson v. Seiter</i> , 893 F.2d 861 (6th Cir. 1990)	1
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	35
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	25
<i>Wright v. Jones</i> , 907 F.2d 848 (8th Cir. 1990)	16, 17

CONSTITUTIONAL PROVISIONS AND
STATUTES:

Eighth Amendment to the United States Consti- tution	passim
28 U.S.C. § 1254	2

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1343	1, 2, 3
42 U.S.C. § 1983	1, 2, 11, 17
F.R.Civ.P. 25	23

OTHER AUTHORITIES:

American Correctional Association Standard 2- 4131	36, 37
30 American and English Encyclopedia of Law (2d ed. 1905)	27

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 89-7376

PEARLY L. WILSON,
Petitioner,

- v.

RICHARD SEITER, *et al.,*
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on January 16, 1990, is reported at 893 F.2d 861 and is reprinted in the Joint Appendix separately filed (hereinafter "App."). The unreported trial court opinion is also reprinted in the Joint Appendix. App. 53-59.

JURISDICTION

Petitioner filed this action on August 28, 1986. The district court had jurisdiction of the case pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The district court denied petitioner's motion for reconsideration of its grant

of summary judgment against him on February 24, 1988. Petitioner filed a notice of appeal on March 2, 1988. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were issued on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia, Circuit Justice for the Sixth Circuit, granted an application to extend until May 2, 1990 the time for filing a petition for writ of certiorari. The petition was filed on May 2, 1990, and the Court granted the petition and the motion for leave to proceed *in forma pauperis* on October 1, 1990. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343.

42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens

or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

This action was filed by the petitioner and another prisoner, acting without counsel, in 1986. The amended complaint alleged that prisoners were double-bunked in dormitories at the HCF with less than fifty square feet per person; that noise levels were excessive; that the dormitory was "nearly frigid" in the winter; and that the clothing provided was inadequate to keep prisoners warm. The amended complaint also claimed that temperatures were excessively high in the summer because of a lack of ventilation, resulting in prisoners experiencing heat-related rashes and prisoners with respiratory problems having difficulty breathing. The complaint further stated that the restrooms were dirty, slippery, and malodorous, and that the food services were a serious threat to the well-being of the prisoners because of inadequate sanitation, ventilation, and sewage drainage. In addition, the complaint alleged that the presence of physically and mentally ill prisoners in the dormitories created a dangerous and stressful environment, and that prisoners were not classified as regulations required. The prisoner plaintiffs requested injunctive and declaratory relief, as well as damages. App. 8-9. The petitioner requested the appointment of counsel,¹ but the trial court took no action on the request.

The parties filed cross-motions for summary judgment with supporting affidavits.² Although the opinion of the

¹ See docket entry for August 28, 1986. App. 1.

² The petitioner did not cross-appeal the denial of his motion for summary judgment.

court of appeals ultimately turned on a state of mind question not directly related to the actual conditions at HCF, petitioner summarizes the parties' affidavits below in order to demonstrate that the record presents a factual conflict.³

³ The petitioner has reorganized the allegations of the affidavits and countering affidavits to clarify the parties' contentions. The unrepresented petitioner submitted seven affidavits from prisoners living in the dormitory. These were countered by several affidavits from staff and a visitor to the HCF.

Ventilation

Petitioner's Allegations

The air in the dormitory is stagnant and foul from toilets, urinals and colostomy bags. It is difficult to sleep at night because of this foul air. In summer, the temperature goes up to 95°, and this heat is aggravated by the lack of ventilation and the fact that fire exits are locked at all times. The fans in the dormitories are inadequate to move the foul air out. As a result of the heat some prisoners "[fall] out" (faint). Prisoners with respiratory problems have trouble breathing; others develop heat rash.

Respondents' Allegations

The dormitories contain two large exhaust fans to increase ventilation and keep down the temperature in summer. The majority of the windows are in working order, and they are opened in summer. No prisoners have been overcome by heat.

Sanitation

Petitioner's Allegations

Urine accumulates around the toilets and urinals and is inadequately cleaned, resulting in offensive odor; floors are filthy because of a lack of proper cleaning supplies. The dormitory is infested with a variety of insects and mice, and extermination is totally inadequate. The dining hall is filthy and the food is prepared by unsupervised, sometimes diseased prisoners. As a result, petitioner fears to eat in the dining hall.

Respondents' Allegations

The restrooms are completely cleaned twice a day, and throughout the day as necessary. The kitchen area and dining room are cleaned after every meal and kept very clean. Prisoner food workers are required to wear hats and plastic gloves. HCF has contracted with

Ultimately, the issue that the court of appeals considered critical to the case was the respondents' state of mind. On this issue, petitioner contended in his affidavit

an exterminator which services the facility twice a month. There have been no known cases of food poisoning.

Overcrowding

Petitioner's Allegations

There are 143 beds in the dormitory; all but twenty eight of the beds are double-bunked. Prisoners have less than 50 square feet per person. The beds are spaced so closely that, with the inadequate ventilation, prisoners smell the body odors of others. The general noise level is high, even during sleeping hours.

Respondents' Allegations

The amount of storage space "appears to be adequate" for most prisoners. There are regulations to control noise. Prisoners have a variety of activities available to them, including television, exercise in the gymnasium or yard, a pool table, a weight room, a prison library, and continuing education classes that involve approximately 100 prisoners.

Lack of Heat

Petitioner's Allegations

The dormitory is "frigid" in winter, causing petitioner physical pain. There are cracks in the walls that can be seen through. Most of the windows cannot be closed completely, so that some bunks get wet during the rain. The clothing is ragged and inadequate to keep prisoners warm in winter; no underwear is distributed.

Respondents' Allegations

The dormitories are adequately heated. Prisoners are not given special winter clothes unless they have jobs that require them to work outside, but they are permitted to buy clothing such as winter underwear. Prisoners are given an extra blanket in winter.

Safety and Protection from Communicable Disease

Petitioner's Allegations

Psychotic prisoners are placed in the dormitories. This causes stress to other prisoners, who cannot predict the behavior of the mentally ill prisoners. Following surgery, prisoners with open sores are housed in the dormitory because of a lack of space in

that he had forwarded a three-page letter complaining of the conditions of confinement to the two respondents on July 6, 1986.⁴ Respondent Seiter, petitioner alleged, never responded to that letter. Respondent Humphreys responded but, according to petitioner, failed to take any corrective action other than to forward a copy of the letter to the HCF Unit Manager and his staff. Petitioner alleged that the Unit Manager and his staff did not take any action to remedy the conditions and that, in fact, they had no power to do so.

Respondents' alleged attempts to remedy conditions included regulations to control noise, the employment of an exterminator, the installation of two fans, and provisions for cleaning the dormitory and food service areas.⁵

The district court denied petitioner's motion for summary judgment, citing "a conflict of fact about the conditions of confinement at the Hocking Correctional Facility." However, the trial court subsequently granted the respondents' motion for summary judgment on the ground that the prisoners' affidavits did not demonstrate "obduracy and wantonness" on the part of the prison officials. In granting summary judgment on the claims of poor

the prison infirmary. One named prisoner housed in the dormitory was repeatedly hospitalized for pneumonia.

Respondents' Allegations

Prisoners with mental problems are sent from HCF to other facilities. Some prisoners have age-related physical health problems. There is an initial medical screening that includes checking prisoners for infectious diseases such as tuberculosis and hepatitis. Based on the health screening there are no prisoners at HCF with active contagious diseases. There has been no outbreak of contagious disease at HCF since it was converted to a prison in 1983. The number of illnesses such as colds is normal in view of the relatively advanced age of the population.

⁴ The affidavit was submitted as part of petitioner's motion for summary judgment, which was filed on November 10, 1986.

⁵ See respondents' allegations in n.3, *supra*.

sanitation, lack of ventilation, and housing the petitioner with prisoners with communicable diseases, the trial court relied on the factual allegations in the affidavits of the respondents. App. 57-58.

Petitioner appealed to the court of appeals.⁶ That court held that petitioner's affidavits were more than colorable, and noted that several circuits had found Eighth Amendment violations arising from conditions similar to those alleged by the petitioner. App. 66. Accordingly, the court held that to the extent that the district judge had adopted the factual allegations in the respondents' affidavits to find that conditions at the HCF did not violate the Eighth Amendment, the district court committed error. App. 66.

The court of appeals also concluded that "some, but not all, of the complained-of conditions suggest the type of seriously inadequate and indecent surroundings necessary to establish an eighth amendment violation." App. 68. (internal quotation marks and citations omitted). However, the court of appeals held that the allegations of mixing mentally ill prisoners with others in the dormitory, excessive heat, and overcrowding did not rise to a constitutional level. With respect to the other claims, the court of appeals held that the respondents' state of mind was the critical issue, as evidenced by respondents' allegations suggesting an attempt to improve conditions. As to these latter allegations, the court stated that:

At least in this circuit, the *Whitley* [*v. Albers*, 475 U.S. 312 (1986)] standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.

App. 71.

⁶ Petitioner continued to proceed *pro se* until the court of appeals appointed counsel. The counsel named in the published opinion withdrew prior to briefing and argument because of the discovery of a conflict of interest. The subsequently-appointed counsel withdrew after the decision of the court of appeals.

Although the court of appeals noted that state of mind is typically not a proper issue for resolution on summary judgment, it held that petitioner's affidavits raised no genuine issue as to the respondents' state of mind. Because the petitioner did not directly dispute the respondents' claims of affirmative efforts to improve conditions, the respondents could not be acting with "obduracy and wantonness . . . marked by persistent malicious cruelty." App. 73. Accordingly, the court of appeals affirmed the trial court's grant of summary judgment.

The judgment of the court of appeals was entered on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia granted petitioner's application for an extension of time to file a petition for writ of certiorari to May 2, 1990. The petition was filed on that date. This Court granted the petition and the motion for leave to proceed *in forma pauperis* on October 1, 1990.

SUMMARY OF THE ARGUMENT

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court, in a damages action arising from the shooting of a prisoner, held that staff did not violate the Eighth Amendment in attempting to suppress a prison riot unless their actions were malicious and sadistic. But the *Whitley* Court also reaffirmed the holding in *Estelle v. Gamble*, 429 U.S. 97 (1976), that prison officials' "deliberate indifference" to prisoners' serious medical needs violates the Eighth Amendment. Thus, while under *Whitley* all Eighth Amendment violations must be characterized by "obduracy and wantonness," this state of mind encompasses both the "deliberate indifference" and the "malicious and sadistic" intent standards. The Court indicated that the less demanding standard applies to Eighth Amendment challenges to prison medical care "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Whitley*, 475 U.S. at 320.

Unlike every other court of appeals that has considered the issue, the court below applied the *Whitley* "prison disturbance" standard to a conditions case, requiring malicious and sadistic intent, rather than the deliberate indifference standard from *Estelle*. This was error because the state's responsibility to provide minimally safe and healthy living conditions does not clash with security considerations. Moreover, because continuing conditions of confinement, unlike the use of force, do not require split-second decisions or involve the special expertise of prison officials, the rationales underlying the "malicious and sadistic" standard of *Whitley* do not apply.

In addition, the lower court's use of the "malicious and sadistic" standard from *Whitley* is inconsistent with this Court's holding in *Rhodes v. Chapman*, 452 U.S. 337 (1981), that courts must apply objective criteria in determining whether conditions of confinement violate the Eighth Amendment. These objective criteria include whether prisoners have been deprived of the basic necessities of life, such as adequate food, clothing, medical care and shelter.

Rhodes' emphasis on objective factors and *Whitley's* references to state of mind can be harmonized in one of two ways. On the one hand, it is possible to read *Whitley's* reference to "obduracy and wantonness" as inapplicable to injunctive challenges to continuing prison conditions, in which case *Rhodes* alone would govern and the focus would be exclusively on the conditions themselves without any inquiry into defendants' state of mind. Alternatively, one can conclude that the consequences of violating the Eighth Amendment standard established in *Rhodes* by depriving prisoners of the basic necessities of life are obvious and foreseeable. Thus, such continuing conditions necessarily involve deliberate indifference, so that a separate inquiry into state of mind is redundant. By contrast, a requirement of "malicious and sadistic" intent is clearly inconsistent with the emphasis

Rhodes placed on an objective examination of prison conditions. Petitioner believes that the former interpretation is both more coherent and easier to apply. But, in either event, the decision of the court of appeals cannot stand.

The lower court also erred in affirming summary judgment because it ignored petitioner's claim that he had notified the respondents of the conditions and they had taken no effective action to correct them. A fair reading of petitioner's *pro se* affidavits is that he either challenged the existence of respondents' claimed remedial efforts or averred that the efforts were ineffective to remedy the challenged conditions. Under these circumstances, the question of respondents' state of mind cannot be separated from the factual merits of the parties' allegations about the underlying claims, and summary judgment was inappropriate.

To allow the respondents' claims of remedial efforts to defeat an Eighth Amendment challenge when the record is in dispute as to whether the claimed remedial actions were effective makes no sense. While remedial actions may well be relevant to mootness or remedy concerns, ineffective remedial steps do not preclude the existence of an Eighth Amendment violation.

Finally, the lower court also erred because, in dismissing the petitioner's claims regarding overcrowding, excessive heat, and the mixing of mentally ill prisoners with others in the dormitory, it failed to consider the interaction of these conditions with the others alleged by petitioner. In determining whether the Eighth Amendment has been violated, a court must examine conditions "taken as a whole." *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

Accordingly, petitioner urges this Court to reverse the judgment of the court of appeals affirming summary judgment in favor of respondents, and remand this case to the district court for trial.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *WHITLEY v. ALBERS*

Whitley v. Albers, 475 U.S. 312 (1986), involved an action for damages pursuant to 42 U.S.C. § 1983. In that case, a state prisoner alleged that his Eighth Amendment right to be free from cruel and unusual punishments was violated when he was shot by a guard in the course of suppressing a prison uprising. In holding that defendant prison officials were entitled to a directed verdict, this Court stated the following:

It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.⁷

Whitley, 475 U.S. at 319. However, the Court further indicated that this "obduracy and wantonness" standard is not rigid and monolithic, but must be applied "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320. Thus, when a prisoner claims that his medical needs have been ignored, "obduracy and wantonness" are demonstrated if prison officials acted with "deliberate indifference." *Id.*, quoting *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). By contrast, "[w]here a prison security measure is undertaken to resolve a dis-

⁷ As explained in Section II, *infra*, the reference to "conduct" may limit *Whitley* to cases in which specific acts by individuals are challenged under the Eighth Amendment. Petitioner argues in Section II that state of mind has never been considered relevant in Eighth Amendment challenges to legislatively enacted penalties, and is similarly irrelevant when prison officials acquiesce in continuing conditions that deprive prisoners of the minimal civilized measure of life's necessities.

turbance," as in *Whitley*, "obduracy and wantonness" are shown only if prison officials used force "maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-321 (internal quotation marks omitted).

The "deliberate indifference" standard is appropriate in medical care cases "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Whitley*, 475 U.S. at 320.

[D]eliberate indifference to a prisoner's serious illness or injury can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates. But, in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. . . . In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.

Id. (internal quotation marks and citation omitted).

Like the obligation to provide medical care, the state's responsibility to provide minimally safe and healthy living conditions for prisoners does not clash with security considerations. The rationales underlying the "malicious and sadistic" standard in the context of a damages action arising from a prison riot do not exist when continuing conditions like unsanitary food or vermin infestation are at issue. First, the interest in avoiding the second-guessing of prison officials is greatest when they are making split-second, life-and-death decisions during an emergency. This is not the case with conditions that develop

or persist over time, allowing officials ample opportunity for reflection. Second, prison officials are experts in prison security; deference to them is properly at its zenith when they make security judgments regarding the use of force.⁸ Decisions about medical care, nutrition, and environmental health involve no special penological competence and deference is less appropriate.⁹

For these reasons, the *Whitley* Court carefully confined the "malicious and sadistic" standard to the limited circumstances of major prison disorders. This standard applies "[w]here a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff." *Whitley*, 475 U.S. at 320.¹⁰

⁸ "When the ever-present potential for violent confrontation and conflagration ripens into *actual* unrest and conflict, the admonition that a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators carries special weight." *Whitley*, 475 U.S. at 321 (emphasis in original, citations and internal quotation marks omitted).

⁹ This Court and lower courts have been especially deferential to prison policies related to the preservation of discipline and institutional security. However, many conditions of confinement, such as overcrowding, poor sanitation, and inadequate safety precautions, are the result of neglect rather than deliberate policy decisions. There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to prison officials when conditions result from a dearth of resources or a lack of motivation to operate decent prisons. See *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981) (Brennan, J., concurring).

¹⁰ *Whitley* involved a "prison riot" in which one officer had been assaulted, another had been taken hostage, and prisoners were armed and had barricaded a cellblock. Officials had been informed (incorrectly) that a prisoner had been killed and that other deaths would follow. 475 U.S. at 314-15, 322-23.

There is a dispute about the extent of *Whitley's* applicability, but it does not reach this case. The Second Circuit applied the "deliberate indifference" standard to a prisoner's claim that prison

The four dissenting members of the Court similarly understood the "malicious and sadistic" standard to apply only in these extraordinary situations. See *Whitley*, 475 U.S. at 328 (Marshall, J., dissenting) (criticizing "the especially onerous standard the Court has devised for determining whether a prisoner injured during a prison disturbance has been subjected to cruel and unusual punishment"). Certainly, in view of the majority's careful distinction, rather than overruling, of *Estelle v. Gamble*, there is no room for argument that the "malicious and sadistic" standard now governs all Eighth Amendment prison cases.

Thus, the court below applied *Whitley* incorrectly.¹¹ That court failed to recognize that the "obdurate and

personnel failed to protect him from assault by other inmates. *Stubbs v. Dudley*, 849 F.2d 83, 86 (2d Cir. 1988), cert. denied, 109 S.Ct. 1095 (1989). Three Justices dissented from the denial of certiorari, questioning the view that *Whitley* is limited to "full-blown prison riots" and suggesting that the *Whitley* "malicious and sadistic" standard should apply because "[t]he situation here was arguably more dangerous than in *Whitley*. . . . Here a split second decision had to be made. A single door stood between armed prisoners, who had engaged in a sit-in earlier in the day, and the prison arsenal and the office of the prison superintendent." *Dudley v. Stubbs*, 109 S.Ct. 1095, 1097 (1989) (O'Connor, J., dissenting) (mem.) (emphasis in original, internal quotation marks omitted).

The *Dudley* dissent provides no support for the view that the *Whitley* "malicious and sadistic" test applies to continuing conditions of confinement like those at issue here. At most, it stands for the proposition succinctly stated by one court of appeals: "Although *Whitley* was decided in the extremely volatile context of a prison riot, its reasoning may be applied to other prison situations requiring immediate coercive action." *Ort v. White*, 813 F.2d 318, 323 (11th Cir. 1987) (emphasis supplied).

¹¹ The decision below is also inconsistent with *Smith v. Wade*, 461 U.S. 30 (1983), in which the plaintiff was raped by his cellmate and was awarded compensatory and punitive damages by a jury. Prison staff argued that the proper standard for punitive damages was "actual malicious intent." This Court upheld instructions embodying a standard of reckless or callous disregard of, or indif-

wanton" standard in *Whitley* encompasses both the "deliberate indifference" and the "malicious and sadistic" intent standards. Which of these two tests applies depends on the nature of the Eighth Amendment violation alleged. Although this case does not involve a prison disturbance, the court of appeals held that "the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty." App. 73. Thus, the court of appeals applied the incorrect prong of the *Whitley* test. Had it applied the "deliberate indifference" standard, it could not have affirmed the district court's entry of summary judgment for respondents.¹²

Following the distinction drawn by this Court in *Whitley*, the Fourth,¹³ Fifth,¹⁴ Eighth,¹⁵ Tenth,¹⁶ and District

ference to, the prisoner's rights, and rejected any requirement that the plaintiff show actual malicious intent.

The standard for constitutional liability was not before the Court. *Id.* at 51. However, in view of the Court's holding that punitive damages required only recklessness or callous indifference, *a fortiori*, the Court could not have approved an actual malice standard for initial liability.

¹² Petitioner's affidavits allege facts which, if true, would establish deliberate indifference on the part of respondents. See n.3, *supra*, and section III, *infra*.

¹³ See *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), discussed in text *infra*.

¹⁴ In *Foulds v. Corley*, 833 F.2d 52 (5th Cir. 1987), the court of appeals reviewed the trial court's dismissal of a prisoner's complaint as frivolous. The prisoner raised due process and Eighth Amendment claims. The latter involved allegations that the solitary confinement cell was very cold and infested with rats and that the prisoner had to sleep on the floor. The Fifth Circuit held that if the prisoner proved his Eighth Amendment allegations, he would be entitled to relief. In the course of doing so, the court explicitly rejected an analysis identical to that employed by the court of appeals in this case:

The district court relied on *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), to require a showing that the deputies acted with malicious and sadistic intent in

subjecting Foulds to the above-described conditions. This reliance was in error. *Whitley* involved the shooting of an inmate during a prison riot. In that setting, involving essential prison security, the Supreme Court required a showing of "malicious and sadistic intent" by prison officials to support a claim under the eighth amendment. *Whitley*, 475 U.S. at 320, 106 S.Ct. at 1085, 89 L.Ed.2d at 261. The facts of the instant case markedly differ. There was no imminent danger. We decline the invitation to extend the rule of *Whitley* to cover all prison disciplinary actions, ostensibly under the guise of achieving prison security. We do not see *Whitley* as the harbinger of such, see 475 U.S. at 319, 106 S.Ct. at 1084, 89 L.Ed.2d at 260 (recognizing the general "unnecessary and wanton" standard of review).

Id. at 54.

A different panel of the Fifth Circuit reached precisely the same conclusion in reversing the dismissal of a prisoner complaint alleging that prisoners contracted tuberculosis as a result of confinement in a dirty, overcrowded cellblock that had inadequate ventilation and lighting as well as insect infestation. In the course of reversing the trial court, the Fifth Circuit made clear that the *Whitley* "malicious and sadistic" intent requirements do not apply to continuing conditions of confinement:

But unlike "conduct that does not purport to be punishment at all" as was involved in *Gamble* and *Whitley*, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement. Prison conditions may violate the eighth amendment even if they are not imposed maliciously or with the conscious desire to inflict gratuitous pain.

Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987). Although the Fifth Circuit *en banc* vacated other portions of the panel's opinion on unrelated procedural grounds, this portion of the decision was reinstated. *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (*en banc*).

¹⁵ In *Wright v. Jones*, 907 F.2d 848 (8th Cir. 1990), the court of appeals considered a prisoner's claim of a failure to protect him arising from a beating by other inmates. The court of appeals rejected the application of a "malicious and sadistic" intent standard, holding that the proper standard for staff liability was "deliberate indifference."

It is not appropriate to apply the *Whitley* standard in this case, because the guards have not identified a competing obligation which inhibited their efforts to protect inmates. Thus,

the guards can be held liable under the deliberate indifference, or reckless disregard, test because liability can be established without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.

Id. at 851. (citations omitted and internal quotation marks removed).

In *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989), a decision not discussing *Whitley*, the Eighth Circuit applied the deliberate indifference standard to affirm a jury verdict against correctional officials based on a failure to maintain sanitation in the plaintiff's cell. The officials claimed that there was no evidence that they actually knew about the plaintiff's conditions of confinement. The Eighth Circuit held that actual knowledge was not required. Rather, the standard was more than negligence but less than malicious or actual intent. The Eighth Circuit held that the pattern of events over a period of two years in a unit supervised by the correctional officials allowed the jury to find tacit authorization or reckless disregard. The court thus upheld the jury instruction, which employed the deliberate indifference standard.

¹⁶ *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), involved a damages suit under 42 U.S.C. § 1983 brought by the widow of a prisoner who had been murdered by other prisoners, allegedly as a result of the wrongful conduct of his jailers. In the course of determining the proper Eighth Amendment test to apply, the Tenth Circuit observed:

[The *Whitley*] standard . . . does not apply to every Eighth Amendment claim. Even while defining its new "malicious[]" and "sadistic[]" standard, the Court carefully preserved the applicability of its "deliberate indifference" standard, articulated in *Estelle v. Gamble* . . .

After careful consideration, we hold that *Whitley*'s "malicious and sadistic" standard does not apply to the facts of this case; rather, the applicable standard is the traditional "deliberate indifference" inquiry of *Estelle*. Unlike *Whitley*, here there is no danger that the deliberate indifference standard will fail to "adequately capture the importance of . . . competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 327, 106 S.Ct. at 1088.

Berry, 900 F.2d at 1494-1495. The *Berry* court emphasized "the distinction so carefully preserved in *Whitley* between the malicious and sadistic standard applicable in prison riot situations and the

of Columbia¹⁷ Circuits, have explicitly rejected the application of the "malicious and sadistic" test to cases challenging continuing conditions of confinement not involving the use of force.

In *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), former Justice Powell, sitting by designation, found that the denial of basic necessities of personal hygiene to a handicapped prisoner violated the Eighth Amendment. The defendant prison officials had been aware of the special hygiene needs of the prisoner and had made some belated, ineffectual attempts to respond to them. *Id.* at 392-393. The court held that the case could be characterized as either a conditions of confinement or a medical care case. In either event, the court held, in such circum-

deliberate indifference standard applicable to more ordinary prison policy decisions." *Id.* at 1495. See also *id.* at 1496 n.8 (noting "the Supreme Court's careful distinction in *Whitley* between riot and more ordinary circumstances").

¹⁷ In *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987), the court upheld a jury verdict finding that correctional officials acted with deliberate indifference in failing to protect the plaintiff from assault by a fellow prisoner. In the course of that affirmance, the court of appeals analyzed *Whitley* and held that the jury instruction based on deliberate indifference was sufficient:

The exigencies and competing obligations facing prison authorities while attempting to regain control of a riotous cellblock, which led the Court to conclude that the "deliberate indifference" standard was inadequate in *Whitley*, are not present in this case. The gravamen of Morgan's claim is the District's overcrowding of the Jail; the conduct Morgan challenges is the municipality's operation of the Jail generally. In this context, unlike in the prison riot setting, there can be no legitimate concern that liability will improperly be based on "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 106 S.Ct. at 1085. The District's practice of prison overcrowding has endured at least since 1971. We therefore conclude that "deliberate indifference" was the appropriate standard by which to judge the District's conduct in this case.

Id. at 1057-1058.

stances *Whitley* required no more than a "deliberate indifference" standard, and the prison officials' conduct demonstrated the requisite deliberate indifference:

Although in *Whitley v. Albers* the Court held that the "deliberate indifference" standard does not adequately capture the importance of the competing obligations that exist in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, *id.* 106 S.Ct. at 1085, the instant case does not involve such concerns. Whether one characterizes the treatment received by LaFaut as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in *Estelle* to this case. In the context of this case there is no clash between LaFaut's treatment and "equally important governmental responsibilities." Cf. *Whitley v. Albers*, 475 U.S. at 320, 106 S.Ct. at 1084.⁴

⁴ To the extent the district court's memorandum and order can be construed as requiring appellant to demonstrate that Hambrick "acted intentionally to deprive LaFaut of medical care," (App. at 102-03) this is erroneous. Appellant need only show that Hambrick was deliberately indifferent to his needs, not that she affirmatively intended to deprive him of the means of satisfying his needs.

834 F.2d at 391-392.

The First,¹⁸ Ninth,¹⁹ and Eleventh²⁰ Circuits have also applied the "deliberate indifference" standard, rather than

¹⁸ In *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 68 (1988), the court of appeals affirmed a jury verdict finding that prison officials had acted with deliberate indifference in failing to protect prisoners' lives in a prison characterized by "severe overcrowding (a system-wide average of twenty square feet per prisoner), squalor, maltreatment, gang warfare, killings, lack of proper medical care, failure to segregate mentally disturbed prisoners, guards unable to control entire cellblocks, and other horrors." *Id.* at 558.

¹⁹ In *Noll v. Carlson*, 809 F.2d 1446, 1449 n.4 (9th Cir. 1987), the court of appeals, citing *Whitley*, reversed the dismissal of a

the "malicious and sadistic" test, to prisoner challenges to conditions of confinement.

It is noteworthy that even the respondents decline to defend the decision of the court of appeals on its own terms. In their opposition to the petition for certiorari, the respondents made no argument that the heightened "malicious and sadistic" intent requirement applies to continuing conditions of confinement. Rather, respondents asserted that the court of appeals did not apply such a requirement. Opposition to Petition for Writ of Certiorari, p.12. That contention is clearly belied by a fair reading of the court's decision. See pp. 7-8, *supra*. In short, the court below is alone in its misapplication of *Whitley*, and its decision constitutes clear error.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S EMPHASIS ON OBJECTIVE CRITERIA FOR DETERMINING WHETHER THE EIGHTH AMENDMENT HAS BEEN VIOLATED

A. Under *Rhodes*, Continuing Conditions of Confinement Are to be Judged by Objective Criteria

In the leading case explicating the standard for judging whether prison conditions violate the Eighth Amendment, this Court did not focus on state of mind, but emphasized

pro se complaint because the prisoner might be able to establish that the alleged failure to protect him constituted deliberate indifference.

²⁰ In *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), a prisoner alleged that his Eighth Amendment rights were violated when he was housed in a dormitory contaminated with asbestos. Characterizing the requirement to be housed in an area not contaminated with asbestos as a serious medical need, the court of appeals applied the "deliberate indifference" standard to the plaintiff's Eighth Amendment claim, and reversed the district court's order of dismissal. See also *Evans v. Dugger*, 908 F.2d 801, 804 (11th Cir. 1990) ("deliberate indifference" test applies to disabled prisoner's claim that he was denied special facilities he needed because of his handicap).

that this inquiry "should be informed by objective factors to the maximum possible extent." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), quoting *Rummel v. Estelle*, 445 U.S. 263, 274-275 (1980), and *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

Consistent with this emphasis on objective criteria, the Court in *Rhodes* examined the impact of conditions upon prisoners, not the intent with which the conditions were imposed, in determining whether the conditions constituted cruel and unusual punishment.

These principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. In *Estelle v. Gamble*, [429 U.S. 97 (1976)], we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. 429 U.S., at 103, 97 S.Ct., at 290. In *Hutto v. Finney*, [437 U.S. 678 (1978)], the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivation of basic human needs. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in *Gamble*, *supra*, at 103-104, 97 S.Ct., at 290-291.

Rhodes, 452 U.S. at 347.

The references to "unquestioned and serious deprivation of basic human needs" and to the "minimal civilized measure of life's necessities" support the contention that the constitutionality of prison conditions is measured by

an objective standard. In addition, the Court's citation to *Estelle*, and its specific affirmation that conditions less extreme than physical torture can violate the Eighth Amendment, are inconsistent with the court of appeals' focus on the state of mind of prison officials rather than the objective impact of the challenged conditions upon prisoners.

In *Rhodes*, this Court cited specific cases of lower federal courts finding that prison conditions violated the Eighth Amendment:

Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as "deplorable" and "sordid." When conditions of confinement amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights."

Id. at 352 (citations and footnote omitted).

In the footnote accompanying this paragraph of the *Rhodes* opinion, the Court cited four prison conditions cases: *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); and *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978) (*per curiam*). In all four of the cases cited, the lower courts relied on an analysis of the gravity of the challenged prison conditions, not on the state of mind of prison officials.

Indeed, in *Ramos*, the Colorado legislature, as amicus curiae, argued that the State had made good faith efforts to remedy the constitutional violations. The Tenth Circuit considered such efforts relevant to the scope of the appropriate remedy, but not to whether an Eighth Amendment violation existed. *Ramos*, 639 F.2d at 585-586.

Even more directly on point, in *Gates*, the Fifth Circuit considered the defendants' argument that their good faith efforts after the filing of the lawsuit warranted setting aside the judgment. The *Gates* court rejected that argument:

The past notoriety of the protracted inhumane conditions and practices at Parchman reveals the necessity for the continuance of the injunctive order of the district court. It is significant that the improvements made at Parchman were not undertaken until after the filing of this suit. Although good faith may be relevant in determining whether defendants have complied with the order of the court, it certainly is not a ground upon which to seek modification of that order.

Gates, 501 F.2d at 1321.²¹

Finally, an important reason for continuing to apply objective criteria to the determination of whether prison conditions violate the Eighth Amendment is the need for uniformity in application of the standard.²² The determination of a prison official's state of mind necessarily involves a more subjective and difficult fact-finding task for a trial court than an inquiry into whether the conditions of confinement deprive prisoners of the minimal

²¹ Similarly, in *Williams v. Edwards*, the Fifth Circuit stated, as it had in *Gates*, that "[t]he prohibition against cruel and unusual punishment 'is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison.'" *Williams*, 547 F.2d at 1212, quoting *Gates*, 501 F.2d at 1301.

²² If state of mind were actually critical in injunctive challenges to continuing conditions, then defendants could theoretically forestall a finding of an Eighth Amendment violation simply by appointing a new prison official, without changing the conditions of confinement. *Cf.* F.R.Civ.P. 25(d) (providing that when a public officer is a party to an action in an official capacity and ceases to hold office, the action does not abate but the officer's successor is automatically substituted as a party).

civilized measure of life's necessities. Moreover, if the finding of an Eighth Amendment violation is not based on objective criteria, there will be no uniform constitutional standard for the nation. Surely the minimal civilized measure of life's necessities does not vary from jurisdiction to jurisdiction.

B. Legislative Policies Challenged Under the Eighth Amendment Do Not Require an Inquiry into State of Mind

Rhodes illustrates that there is no state of mind requirement that governs all Eighth Amendment claims. This point is also evident in the fact that this Court has consistently evaluated Eighth Amendment challenges to statutory penalties without any inquiry into the legislative state of mind. For example, when this Court upheld the death penalty for persons who were sixteen or seventeen years old at the time of their crime, the Court relied on its determination that the record did not reflect objective evidence of a societal consensus against the death penalty for juveniles; the Court did not consider the legislative state of mind in imposing that penalty. See *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989). Nor have Eighth Amendment challenges to statutory penalties less than death ever turned on legislative state of mind. See *Solem v. Helm*, 463 U.S. 277, 290-291 (1983) (holding that an Eighth Amendment challenge to a life sentence without the possibility of parole must be judged by objective criteria); and *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (invalidating punishment of denationalization on Eighth Amendment grounds without considering legislative state of mind).

Indeed, when the Court has specifically considered conditions of confinement imposed as part of the sentence, the Court has looked at the proportionality of the punishment and not at the legislative state of mind in imposing it. *Weems v. United States*, 217 U.S. 349 (1910) (invalidating under the Eighth Amendment a sentence to

"cadena temporal," a form of imprisonment that included hard labor while chained at the ankles and wrists).

C. Continuing Conditions Violating the Eighth Amendment Standard in *Rhodes* Necessarily Involve at Least Deliberate Indifference

Rhodes v. Chapman and the cases involving legislatively-imposed punishments are consistent with this Court's discussion of state of mind in *Whitley*. First, it should be remembered that *Whitley* dealt with a suit for damages challenging the actions of specific individuals during a one-time emergency situation.²³ Indeed, the Court in *Whitley* stated that obduracy and wantonness characterize "the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley*, 475 U.S. at 319 (emphasis added). *Whitley* does not address conditions of confinement that do not result from specific individual conduct, but rather from legislative enactments, a policy or custom of the governmental authority, or the collective neglect of state or local officials.

In addition, continuing prison conditions that violate the Eighth Amendment under *Rhodes* necessarily involve at least deliberate indifference, and thus satisfy any relevant state of mind requirement under *Whitley*. When prisoners are subjected to continuing conditions that deprive them of the basic necessities of life such as adequate food, clothing, medical care, and shelter, prison officials have violated a duty to the prisoners imposed by the Con-

²³ A prison official's state of mind may well be relevant if the issue is liability for damages resulting from the use of force, but not if the issue is whether continuing conditions should be enjoined.

For similar reasons, public officials charged with violations of the Constitution enjoy qualified good faith immunity in damages but not in injunctive actions. See *Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975). Here, the petitioner sought injunctive relief as well as damages, and it was particularly inappropriate to apply the "malicious and sadistic" intent standard to the claims for injunctive relief.

stitution, a duty that does not exist with regard to the general public. See *DeShaney v. Winnebago County DSS*, 109 S.Ct. 998, 1005-1006 (1989):

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg v. Romeo*, [457 U.S. 307, 317 (1982)] ("When a person is institutionalized—and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist"). The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. See *Estelle v. Gamble*, [429 U.S. 97, 103-104 (1976)]; *Youngberg v. Romeo*, *supra*, 457 U.S., at 315-316, 102 S.Ct., at 2457-2458. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. See *Estelle v. Gamble*, 429 U.S., at 103, 97 S.Ct., at 290 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met").

Accord, West v. Atkins, 108 S.Ct. 2250, 2258 (1988).

The consequences of the failure to perform this affirmative duty are obvious and foreseeable, so that the existence of continuing conditions of confinement that deprive prisoners of the minimal civilized measure of life's necessities is by definition wanton and obdurate. Conscious indifference to this affirmative duty is the textbook example of wanton behavior. See *Howard v. Adkison*, n.15, *supra*.

In *Smith v. Wade*, 461 U.S. 30 (1983), the Court considered the tort definition of the word "wanton" in the course of considering whether punitive damages could be awarded under § 1983. In that context, the Court quoted the definition of "wanton" from 30 *American and English Encyclopedia of Law* 2-4 (2d. ed. 1905):

Wanton . . . has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure.

461 U.S. at 39 n.8.

Even without reference to the prison officials' affirmative duty toward prisoners, such conditions of confinement constitute deliberate indifference. Cf. *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197, 1205 (1989) (footnote omitted):

But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.²⁴

See also *City of Canton* at 1209 (O'Connor, J., concurring in part and dissenting in part):

[T]he "deliberate indifference" standard we adopt today [has] required a showing of a pattern of vio-

²⁴ While *City of Canton* dealt with the issue of what constituted a municipal "policy or custom," not the substantive standard for constitutional liability, the discussion of the deliberate indifference standard seems equally applicable to the meaning of deliberate indifference under the Eighth Amendment.

lations from which a kind of "tacit authorization" by city policymakers can be inferred.

(Citations omitted).²⁵

In light of the affirmative duty that prison officials owe to prisoners, if prison conditions constitute such disproportionate punishment as to violate the Eighth Amendment, or deprive prisoners of the minimal civilized measure of life's necessities, any state of mind requirement under the Eighth Amendment is necessarily satisfied. Accordingly, when a court analyzes an injunctive challenge to continuing prison conditions, a separate inquiry into state of mind is redundant.

The lower federal courts have routinely applied this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment, in a manner consistent with this analysis. When a case focuses on continuing conditions of medical care, rather than on the factual circumstances of an individual instance of alleged failure to treat, the federal courts have held that a pattern of failures to make adequate provision for medical care, including obvious failures to provide adequate staffing or equipment, demonstrates deliberate indifference justifying injunctive relief. See, e.g., *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981):

In class actions challenging the entire system of health care, deliberate indifference to inmates' health needs may be shown by proving repeated examples of negligent acts which disclose a pattern of conduct by prison medical staff, or by proving there are such

²⁵ *Graham v. Connor*, 109 S.Ct. 1865, 1873 (1989), indicates that the language of the Eighth Amendment suggests an inquiry into subjective state of mind. For the reasons given in *Whitley*, however, that state of mind, even in damages actions, in appropriate circumstances requires no more than deliberate indifference when continuing conditions of confinement are involved.

systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.

(Citations omitted). See also *Rogers v. Evans*, 792 F.2d 1052, 1058-59 (11th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); and *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977).

As explained in the amicus curiae brief of the American Public Health Association, when prisoners are subjected to continuing conditions that deprive them of the basic necessities of life such as adequate food, clothing, and shelter, such practices generally do not result from a malicious intent to inflict pain. Rather, such conditions typically result from unreasonable neglect and failure to remedy obvious conditions, the textbook examples of deliberate indifference. Imposing a requirement that prison officials' state of mind be malicious and sadistic would be fundamentally inconsistent with this Court's emphasis on objective and consistent application of Eighth Amendment standards, and would gravely compromise the implementation of prison officials' duty to assure the minimum necessities of life to prisoners.

D. Conclusion

If state of mind is relevant at all to prison condition cases under *Rhodes*, plaintiffs should not be required to prove anything more than the "deliberate indifference" of prison officials. First, the "deliberate indifference" standard is consistent with the constitutional and policy analysis of *Whitley*. Second, the standard is consistent with the emphasis on objective criteria articulated in *Rhodes*. Third, it fairly reconciles the decisions in *Whitley* and *Rhodes* because prison conditions that violate the Eighth Amendment standard of *Rhodes* necessarily in-

volve at least "deliberate indifference," and thus satisfy any state of mind requirement imposed by *Whitley*. Thus, a court considering an injunctive challenge to prison conditions need not separately analyze the defendants' state of mind.

III. THE GRANT OF SUMMARY JUDGMENT WAS ERROR

A. Under a Correct Legal Standard, Factual Disputes Precluded Summary Judgment

As noted above, the court of appeals acknowledged in *Wilson* that several circuits had found constitutional violations under the Eighth Amendment based on conditions of confinement similar to those alleged by the petitioner. App. 66. In addition, the court of appeals conceded that at least some of the conditions alleged by petitioner "suggest the type of seriously inadequate and indecent surroundings necessary to establish an eighth amendment violation." App. 68 (internal quotation marks and citation omitted).

Had the court of appeals applied a correct legal analysis, it would have held that factual conflicts in the record prevented resolution of the case on summary judgment. The allegations of the petitioner's affidavits, taken together, put in issue whether petitioner has been deprived of the "minimal civilized measure of life's necessities" with regard to food, sanitation, and shelter under *Rhodes*.

Filth, foul odors, unclean food, vermin infestation, a stifling lack of ventilation coupled with high temperatures in summer and frigid temperatures in winter, bunks wet with rain from malfunctioning windows, and psychotic prisoners and prisoner with open sores mixed into the population²⁶ are all obviously inhumane conditions. When such conditions occur on a continuing basis, failure to

²⁶ See note 3, *supra*.

remedy them is deliberate indifference in light of the respondents' duties. It is certainly deliberate indifference in light of petitioner's allegation that he specifically informed the respondents of the conditions and that they did nothing to cure the conditions. Accordingly, even if petitioner were required to prove that respondents were deliberately indifferent, summary judgment against petitioner was inappropriate on this record.

Thus, the court of appeals' error stemmed directly from its inappropriate application of the malice standard from *Whitley*:

Additionally, the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior.

App. 73.²⁷

²⁷ It is true that the court of appeals also stated that the record at most suggests negligence on the part of the respondents. For the reasons given above, however, it is apparent that petitioner's allegations of obvious and continuing conditions, coupled with the claim of notice and a lack of response, would, if proven, constitute deliberate indifference and not mere negligence. This is particularly true because the court of appeals conceded that petitioner's affidavits suggested the sort of indecent conditions necessary to violate the Eighth Amendment.

Petitioner thus believes that the record clearly shows a factual conflict with regard to whether respondents acted with deliberate indifference. But even if this Court were not to decide whether deliberate indifference is sufficiently put at issue on this record, the court of appeals' dictum is not controlling. Since the lower court's erroneous choice of the "malicious and sadistic" standard may well have affected its entire view of the facts, this Court may reverse and remand to the court of appeals for consideration of this issue under the proper standard. *Cf. American Foreign Service Ass'n v. Garfinkel*, 109 S.Ct. 1693, 1697 (1989) (returning remaining issue to lower court when lower court had previously analyzed issue "only in abbreviated fashion" so that this Court did not have benefit of lower court's analysis to guide resolution of the merits).

B. The Petitioner's Affidavits Either Challenge the Existence of the Claimed Remedial Efforts or Challenge the Claim that the Remedial Efforts Had Any Significant Impact upon Conditions

The court of appeals affirmed the grant of summary judgment against the petitioner on the ground that the affidavits filed by the petitioner did not raise an issue of material fact as to the defendant prison officials' state of mind, because the petitioner's affidavits did not specifically contradict the respondents' claims of remedial efforts.

The petitioner's own affidavit indicates that on July 8, 1986, he sent a letter to respondents Richard Seiter and Carl Humphreys; that Seiter never replied; and that Humphreys responded only by referring the letter to Mr. Friend, HCF Unit Manager, and his staff. In addition, petitioner alleged:

Mr. Fr[ie]nd could not, and did not take any action to alleviate or correct the constitutional violations as complained of, nor did any member of his staff. In fact, neither Mr. Fr[ie]nd or his staff has any power to correct the violations.

App. 33. This affidavit was included in petitioner's motion for summary judgment, filed November 10, 1986.

A fair reading of petitioner's affidavits is that he challenged the existence of the claimed remedial efforts, or asserted that they failed to correct the challenged conditions. In the case of ventilation, for example, the petitioner did not deny that fans had been installed. Rather, the claim is that ventilation remains completely inadequate despite the fans. Petitioner claimed that the air in the dormitory is stagnant and foul from toilets, urinals, and colostomy bags, making it difficult to sleep at night. In summer, the temperature goes up to 95°, and the fire exits are locked at all times, and as a result of the

heat some prisoners "[fall] out" (faint). See n.3, *supra*.²⁸

On the issue of sanitation in food services and the dormitory, the petitioner's claims of filth, food prepared by unsupervised and diseased prisoner workers, offensive odors, and vermin infestation simply contradict the respondents' claims of daily cleaning. If the petitioner's allegations regarding sanitation are true, the respondents' claimed remedial efforts are obviously so ineffectual as to be meaningless.

Clearly, for the trial court to have any useful information about the harm to prisoners, it is critical to know what the facts are. If, for example, the filth alleged by petitioner, in combination with the other conditions, is so extreme as to violate the *Rhodes* standard, the degree of disregard of the affirmative duty toward prisoners is far more serious than if the actual conditions do not deprive prisoners of the minimal civilized measure of life's necessities. The question of whether the conditions involve deliberate indifference or simply negligence cannot be separated from the issue of whether the conditions deprive prisoners of the minimal civilized measure of life's necessities. Accordingly, whether one views the petitioner's affidavits as directly disputing the existence of the respondents' claimed remedial efforts, or as simply disputing the results of those efforts, it is apparent that petitioner has alleged that the unconstitutional conditions have continued unabated despite notification of the respondent prison officials.²⁹

²⁸ The respondents denied that any prisoners had been overcome by heat; their affidavits do note that some prisoners with age-related health problems are housed in the dormitory. Respondents did not specifically reply to the allegation that the heat caused prisoners with respiratory problems to have difficulty breathing, or the allegation that, as a result of the conditions, prisoners developed heat rash.

²⁹ In this case, although the petitioner requested the appointment of counsel in the trial court, the petitioner was required to defend

C. An Eighth Amendment Violation Cannot Be Cured by Ineffectual Remedial Efforts

The position of the court of appeals is that even if continuing conditions of confinement deprive prisoners of the minimal civilized measure of life's necessities,³⁰ a mere allegation of remedial efforts prevents an inquiry into the objective effect of the conditions on prisoners, since such efforts negate the possibility that prison officials acted with malice.

This position, if adopted by the Court, would effectively insulate prison conditions from Eighth Amendment review. It is also fundamentally inconsistent with basic principles of federal jurisdiction. See *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952):

When defendants are shown to have settled into a continuing practice . . . courts will not assume that it has been abandoned without clear proof . . . It is

against a motion for summary judgment without the assistance of counsel. Requiring a plaintiff to prove that defendants acted maliciously and sadistically under the emergency use of force standard set forth in *Whitley* is particularly unfair when applied to a prisoner appearing *pro se* who challenges continuing conditions of confinement.

A *pro se* prisoner cannot reasonably be expected to challenge directly the respondents' state of mind. Aside from the fact that petitioner had no reason to expect that he would be required to prove a malicious and sadistic state of mind on the part of respondents, it is unrealistic to expect that, had petitioner known of the requirement, he could have produced any evidence other than the evidence he actually produced: affidavits addressing the actual conditions and evidence that the respondents knew of the conditions and did not act.

³⁰ See *Wilson*, App. 66:

Moreover, appellants' affidavits are more than colorable, and obviously place the conditions surrounding confinement in issue. Several circuits have found eighth amendment violations arising from conditions similar to those alleged by the appellants.

(Citations omitted).

the duty of courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

See also *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 288-289 (1982) (a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice).

Obviously remedial efforts are relevant to the scope of the appropriate remedy or to possible mootness arguments. But when remedial efforts are ineffectual, this Court should not apply a rule for Eighth Amendment claims different from the federal jurisdictional principles applicable to other constitutional claims. In a case challenging continuing conditions of prison confinement, it is possible that remedial measures by the defendants may be so ineffectual that the resulting conditions still deprive prisoners of the minimal measure of life's necessities. In such a case, just as the prison officials necessarily know of, and give tacit authorization to, the original conditions (see Section II.C, *supra*), they necessarily know of, and acquiesce in, the conditions that remain after their claimed remedial efforts. For that reason, acquiescence in conditions that continue, even after remedial efforts, to be unacceptable under the *Rhodes* standard is deliberately indifferent to the prisoners' right to be free from cruel and unusual punishment.

Failure to reverse the decision of the court of appeals would once again place prisoners outside of the protection of the Constitution. See *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974):

But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.

IV. THE COURT OF APPEALS ERRED IN DISMISSING CERTAIN OF PETITIONER'S CLAIMS

The court of appeals dismissed petitioner's claims regarding overcrowding, excessive heat, and mixing of mentally ill prisoners with others in the dormitory, holding that these allegations did not rise to the level of a constitutional violation. App. 68. This was error, because these claims should have been considered as part of the overall conditions challenged in the dormitory. Conditions of confinement, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. *Rhodes*, 452 U.S. at 347. See also *id.* at 363 n.10 (Brennan, J., concurring) ("The Court today adopts the totality-of-the-circumstances test") (citations omitted). In *Hutto v. Finney*, 437 U.S. 678 at 688, this Court noted "the interdependence of the conditions producing the [Eighth Amendment] violation." Accordingly, the Court in *Hutto* approved the action of the lower court determining whether the Eighth Amendment had been violated by examining conditions "taken as a whole." *Id.* at 687.

For example, the claim that the dormitory is overcrowded cannot be evaluated without considering the claims of filth, lack of ventilation, and mixing of physically ill prisoners into the general population. Certainly the adequacy of the ventilation is directly related to the degree of crowding in the facility. The reasonableness of using two fans to supply ventilation for a dormitory turns on the number of bodies in the dormitory. Minimally adequate ventilation for 143 prisoners is different from the ventilation necessary for the smaller number of prisoners that could be accommodated were the dormitory not double-bunked.³¹ Similarly, the allegations of filth,

³¹ For example, American Correctional Association (ACA) Standard 2-4131 requires that multiple housing areas provide air circulation of at least ten cubic feet of outside or recirculated air per minute per occupant. While the petitioner does not argue that the

vermin infestation, and build-up of urine around the toilets and urinals may well be related to the greater pressure on the sanitation of the facility resulting from the increase in population. Petitioner also alleged that prisoners recovering from surgery, including prisoners with open sores, were put into the dormitories as a result of a shortage of space in the infirmary. Again, this allegation suggests an interrelation between overcrowding and the other claims of the petitioner.

In addition, the petitioner alleged that respondents were planning further increases in population, and the installation of cubicle divisions in the dormitory, steps that would exacerbate the lack of adequate ventilation. App. 35. These changes, if they occurred, would also be relevant in judging the constitutionality of the resulting conditions.³²

Similarly, the claims of excessive heat cannot be viewed in isolation from the other claims raised by the petitioner. The degree of potential harm from air that is 95° Fahrenheit depends on the relative humidity of the air, the presence or absence of ventilation, the general health of the persons exposed to this condition, and the duration of exposure. In this case, the petitioner alleged that the air was damp because of nonfunctioning windows.³³ In addi-

ACA Standard establishes a constitutional requirement, it demonstrates that the adequacy of ventilation cannot be considered apart from the number of occupants required to share the dormitory. *Cf. Rhodes*, 452 U.S. at 348 n.13.

³² While the overcrowding might not be unconstitutional in itself, because the effect of overcrowding cannot be separated from the overall conditions of the unit, the trial court on remand should not arbitrarily exclude evidence of the impact of overcrowding on the overall conditions in the dormitory. See *Tillery v. Owens*, 907 F.2d 418, 427-428 (3d Cir. 1990).

³³ The affidavits in support of petitioner alleged that wet towels and face cloths hung in the dormitory took at least eight to ten hours to dry (App. 18, 20), also suggesting high relative humidity.

tion, the respondents conceded that some prisoners have age-related physical health problems. In view of the fact that petitioner specifically alleged that, as a result of the heat, some prisoners "[fall] out;" that prisoners with respiratory problems have trouble breathing; and that prisoners develop heat rash, it was error to dismiss the claim of excessive heat.

It was also error to dismiss the claim of mixing psychotic and general population prisoners in the dormitory. Petitioner alleged that this lack of classification caused stress because other prisoners could not predict the behavior of the mentally ill prisoners. App. 11. The lower court dismissed this claim on the ground that petitioner had not established that he was in reasonable fear of attack, citing *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985). The court below held that "the absence of allegations of prior physical violence involving any inmate supporting [petitioner's] claims leads us to conclude that [his] fear is not reasonable." App. 69. While that comment might be persuasive if petitioner had simply cited a generalized concern about lack of personal safety, it ignores petitioner's specific claim about the mixing of psychotic prisoners with general population prisoners. A fear of psychotic prisoners is not an unreasonable fear, and the claim should not have been dismissed without an evidentiary inquiry into whether psychotic, dangerous prisoners were actually mixed into the general population as a result of overcrowding, creating an unreasonably dangerous situation.³⁴

³⁴ The consequences of mixing mentally deranged inmates with the mentally healthy are not limited to the danger of physical assault. One court cited the smell of feces and accumulated filth, intense noise from screaming, the setting of fires, and the sight and sound of self-mutilation and other "seemingly demented activity." *Langley v. Coughlin*, 715 F.Supp. 522, 543-44 (S.D.N.Y. 1989); accord, *DeMallory v. Cullen*, 855 F.2d 442, 444-45 (7th Cir. 1988). Sometimes the mentally ill inmates are endangered by being mixed with the general population. See, e.g., *Cortes-Quinones v.*

Accordingly, the court of appeals erred in examining petitioner's claims in isolation, rather than evaluating the totality of conditions, including possible interactions among the various conditions.

Jimenez-Nettleship, 842 F.2d 556, 559-560 (1st Cir. 1988). After full evidentiary presentations, several courts have concluded that the Constitution requires separation of the mentally ill from the general population in prisons and jails. See *Tillery v. Owens*, 719 F.Supp. 1256, 1303 (W.D.Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990) (after trial); *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 868 (D.D.C. 1989) (after trial); inmates with mental health problems barred from administrative/punitive segregation area); *Albro v. County of Onondaga, N.Y.*, 627 F.Supp. 1280, 1286 (N.D. N.Y. 1986) (after hearing on preliminary injunction motion); *Reece v. Gragg*, 650 F.Supp. 1297, 1304-05 (D.Kan. 1986) (summary judgment after a series of hearings and court inspections); see also *Jones v. Diamond*, 594 F.2d 997, 1016 (5th Cir. 1979) (jails should separate pretrial detainees from violent, disturbed, and contagiously ill individuals as much as possible).

The record does not reveal whether the "stress" caused to other prisoners by the mingling of psychotics in dormitories reaches the levels described in cases like *Langley*, *supra*. But certainly a claim of this nature should not have been dismissed based only on a *pro se* litigant's failure to spell it out in sufficient detail.

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand to the district court for trial.

Respectfully submitted,

ELIZABETH ALEXANDER *
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ

NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1875 Connecticut Ave., N.W., #410
Washington, D.C. 20009
(202) 234-4830

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216) 781-6278

JOHN A. POWELL
STEVEN A. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Counsel for Petitioner

* Counsel of Record

①

RECEIVED
JUL 15 1969
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE

FEDERAL COURT OF THE UNITED STATES

CRIMINAL TERM, 1969

PEARLY L. WILSON

Petitioner,

ROBERT REVER, et al.

Respondents

FEDERAL COURT OF THE UNITED STATES
DISTRICT OF COLUMBIA

CRIMINAL TERM, 1969

ROBERT A. GIBSON, JR.
Attorney General of Ohio

W. A. RICHARDSON
Chief, Criminal Litigation Section
Department of Justice

ROBERT A. MILLER
Deputy Chief Counsel

ROBERT W. RYAN
Chief, Criminal Division
Federal Bureau of Investigation
Assistant Attorney General
400 West Street, 20th Floor
Washington, D.C. 20535-0410
(202) 456-6114

COUNCIL FOR RESPONDENTS

LIST OF PARTIES

Respondent, Richard P. Seiter, listed in this action as the Director of the Ohio Department of Rehabilitation and Correction has been succeeded in his official capacity by George W. Wilson. Respondents otherwise agree with the List of Parties as presented by Petitioner.

TABLE OF CONTENTS

	PAGE
LIST OF PARTIES	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
 I. THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE PROHIBITS CONDITIONS OF CONFINEMENT THAT CONSTITUTE PUNISHMENT, DEPRIVE INMATES OF BASIC HUMAN NEEDS, AND ARE CAUSED BY OFFICIALS ACTING WITH A WANTON AND OBDURATE STATE OF MIND	 8
A. Prison Conditions Are Not Cruel And Unusual Punishment Where They Provide The Minimal Civilized Measure Of Life's Necessities And Where Conditions Do Not Inflict Wanton And Unnecessary Pain	8
1. An Eighth Amendment claim should first be evaluated to determine whether punishment has been inflicted	9
2. Conditions of confinement that constitute punishment must be objectively evaluated to determine whether an inmate has been seriously deprived of basic human needs	13

3. An Eighth Amendment claim must also be evaluated to determine whether prison officials acted with a culpable state of mind, for to hold otherwise would impose strict liability on prison officials	14
4. In an Eighth Amendment case, each challenged condition must constitute cruel and unusual punishment	21
5. Failing to consider the efforts taken by prison officials to provide for prisoners' basic human needs imposes strict liability	22
 B. Prison Conditions That Are Not Imposed In A Wanton And Obdurate Manner Do Not Violate The Eighth Amendment Prohibition Against Cruel And Unusual Punishment ...	23
1. Where prison officials have provided for inmates' basic human needs prison officials could not have been deliberately indifferent	24
2. After <i>Whitley v. Albers</i> all Eighth Amendment claims must be evaluated under a wanton and obdurate state of mind standard	24
3. Wanton and obdurate behavior for Eighth Amendment conditions of confinement claims requires a showing of malice	26
 II. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF THE RESPONDENTS.	36

CONCLUSION	46
APPENDIX TO BRIEF FOR RESPONDENTS	A-1

TABLE OF AUTHORITIES

Cases	PAGES
<i>Anderson v. Liberty Lobby, Inc.</i> 477 U.S. 242 (1986)	39, 41, 44
<i>Bass v. Jackson</i> , 790 F.2d 260 (2d Cir. 1986)	30
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	<i>passim</i>
<i>Berry v. City of Muskogee</i> , 900 F.2d 1489 (10th Cir. 1990)	33
<i>Birrell v. Brown</i> 867 F.2d 956 (6th Cir. 1989)	27
<i>Blankenship v. Meachum</i> , 840 F.2d 741 (10th Cir. 1988)	44
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	37, 39, 43
<i>Chapman v. Rhodes</i> , 434 F. Supp. 1007 (S.D. Ohio 1977), <i>aff'd</i> , 624 F.2d 1099 (6th Cir. 1980), <i>rev'd</i> , 452 U.S. 337 (1981)	22
<i>City of Canton, Ohio v. Harris</i> , 109 S. Ct. 1197 (1989)	26, 30
<i>Cody v. Hillard</i> , 830 F.2d 912 (8th Cir. 1987) (en banc), <i>cert. denied</i> , 485 U.S. 906 (1988)	8
<i>Corselli v. Coughlin</i> , 842 F.2d 23 (2d Cir. 1988)	34

<i>Cortes-Quinoçes v. Jimenez-Nettleship</i> , 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823 (1988)	17, 33
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	25
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986)	25
<i>Duchesne v. Sugarman</i> , 566 F.2d 817 (2d Cir. 1977)	32
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	6, 15, 16, 17, 24, 26, 45
<i>Evans v. Dugger</i> , 908 F.2d 801 (11th Cir. 1990)	33
<i>Foulds v. Corley</i> , 833 F.2d 52 (5th Cir. 1987)	33
<i>Gates v. Collier</i> , 501 F.2d 1291 (5th Cir. 1974)	18, 19
<i>Givens v. Jones</i> , 900 F.2d 1229 (8th Cir. 1990)	34, 35
<i>Graham v. Connor</i> , 109 S. Ct. 1865 (1989)	17
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	9, 13, 28
<i>Hamm v. DeKalb County</i> , 774 F.2d 1567 (11th Cir. 1985), cert. denied, 475 U.S. 1096 (1986)	12, 19, 31
<i>Harris v. Fleming</i> , 839 F.2d 1232 (7th Cir. 1988)	14

<i>Holloway v. Lockhart</i> , 813 F.2d 874 (8th Cir. 1987)	35
<i>Hoptowit v. Ray</i> , 682 F.2d 1237 (9th Cir. 1982)	22
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	8, 14, 28
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	23
<i>Johnson v. Pelker</i> , 891 F.2d 136 (7th Cir. 1989)	44
<i>LaFaut v. Smith</i> , 834 F.2d 389 (4th Cir. 1987)	33
<i>Lujan v. National Wildlife Federation</i> , 110 S. Ct. 3177 (1990)	45
<i>Matsushita Elec. Inc. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	40
<i>McGhee v. Foltz</i> , 852 F.2d 876 (6th Cir. 1988)	30
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961)	32
<i>Morgan v. District of Columbia</i> , 824 F.2d 1049 (D.C. Cir. 1987)	33
<i>Noll v. Carlson</i> , 809 F.2d 1446 (9th Cir. 1987)	33

<i>Ort v. White</i> , 813 F.2d 318 (11th Cir. 1987)	35
<i>Powell v. Lennon</i> , 914 F.2d 1459 (11th Cir. 1990)	33
<i>Ramos v. Lamm</i> , 639 F.2d 559 (10th Cir. 1980), <i>cert. denied</i> , 450 U.S. 1041 (1981)	18, 19
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	<i>passim</i>
<i>Ruefly v. Landon</i> , 825 F.2d 792 (4th Cir. 1987)	44
<i>State of Louisiana ex rel. Francis v. Resweber</i> , 329 U.S. 459 (1947)	16, 22
<i>Stubbs v. Dudley</i> , 849 F.2d 83 (2d Cir. 1988), <i>cert. denied</i> , 109 S. Ct. 1095 (1989)	25, 34
<i>Vigliotto v. Terry</i> , 873 F.2d 1201 (9th Cir. 1989)	45
<i>Webster v. Reproductive Health Services</i> , 109 S. Ct. 3040 (1989)	26
<i>Wells v. Brown</i> , 891 F.2d 591 (6th Cir. 1989)	36
<i>Whitley v. Albers</i> , 475 U.S. 312 (1986)	<i>passim</i>
<i>Pearly Wilson v. George Denton, et al.</i> , Case Nos 89-3454 and 89-3978 (6th Cir. March 20, 1990) unreported, <i>cert. denied</i> , 110 S. Ct. 2217 (1990)	36

<i>Wilson v. Seiter</i> , 893 F.2d 861 (6th Cir.), <i>cert. granted</i> , 111 S. Ct. 41 (1990)	<i>passim</i>
<i>Woodhous v. Commonwealth of Virginia</i> , 487 F.2d 889 (4th Cir. 1973)	30
<i>Wright v. Jones</i> , 907 F.2d 848 (8th Cir. 1990)	33
<i>Wright v. Rushen</i> , 642 F.2d 1129 (9th Cir. 1981)	31

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV	17
U.S. Const. Amend. V	25
U.S. Const. Amend. VIII	<i>passim</i>
5 U.S.C. §§3371-3376	2
42 U.S.C. §1983	2, 32
Ohio Rev. Code. Ann. §9.86	3

RULES

Sup. Ct. R. 14	15
Fed. R. Civ. P. 1	37
Fed. R. Civ. P. 11	36, 38
Fed. R. Civ. P. 56	37, 38

MISCELLANEOUS

Black's Law Dictionary (6th ed. 1990)	29, 30
---	--------

No. 89-7376

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PEARLY L. WILSON,

Petitioner,

v.

RICHARD SEITER, et al.,

Respondents.

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Hocking Correctional Facility (HCF) is a medium security institution in Nelsonville, Ohio. (J.A. 47).¹ The facility was originally constructed in 1956 and served as a tuberculosis hospital until its conversion to a medium security prison in 1983. (J.A. 40, 47). The prisoners at HCF are housed in two large dormitories, each accommodating approximately 140 prisoners, and an honor dormitory housing forty-six prisoners. (J.A. 40). The dormitories resemble army barracks, with long rows of bunk beds and lockers for each inmate's personal possessions. (J.A. 49).

HCF houses older inmates who are allowed considerable freedom of movement within the institution.² (J.A. 48, 49).

¹ References to (J.A.) are to the appropriate pages in the Joint Appendix. References to (A.) are to the appropriate pages in the Appendix to the Brief for Respondents.

² The unit manager of HCF confirmed that older inmates are placed at HCF for their protection. (J.A. 42, Friend Affidavit at ¶26). For example, Inmate Vinson was seventy-seven years old when he signed an affidavit in support of Petitioner's motion for summary judgment. (J.A. 19).

Inmates may choose to watch television, including subscription cable television and the Home Box Office channel, in one of the large television rooms, exercise in the gymnasium, walk around the yard, play billiards on the pool table, read in the prison library, visit guests in the visitors' lounge, or further their education in supervised continuing education classes. (J.A. 48, 49). Inmates are required to report to their bunks only at night and for several periodic counts during the day. (J.A. 49).

Petitioner, Pearly L. Wilson,³ brought this action under 42 U.S.C. § 1983 against Richard P. Seiter,⁴ then Director of the Ohio Department of Rehabilitation and Correction,⁵ and Carl Humphreys,⁶ then warden of HCF. (J.A. 3-4). Seiter and Humphreys were alleged to have inflicted cruel and unusual punishment on Petitioner in contravention of the Eighth Amendment to the United States Constitution due to the allegedly unfit conditions at HCF. Petitioner and the second plaintiff, Everett Hunt, Jr., sought damages from the two defendants in their individual capacities in the amount of

³ The second named plaintiff, Everett Hunt, Jr., is no longer confined at HCF and is not a party to this petition. Furthermore, this case was not pursued as a class action.

⁴ Mr. Seiter is no longer Director of the Ohio Department of Rehabilitation and Correction. At the time Mr. Seiter served as Director he was a United States Bureau of Prisons employee on loan to Ohio pursuant to the Intergovernmental Personnel Act of 1970, 5 U.S.C. §§ 3371-3376. Mr. Seiter returned to the United States Bureau of Prisons in 1988. Given Mr. Seiter's employment with the federal government, the participation of the United States as *amicus curiae* is curious.

⁵ Mr. George W. Wilson is the current Director of the Ohio Department of Rehabilitation and Correction. No substitution of parties has been made in this case as Respondents have been sued in their individual as well as their official capacities.

⁶ Mr. Humphreys is no longer warden of HCF. Carole Shiplevy is the current HCF warden.

\$1.8 million dollars,⁷ as well as declaratory and injunctive relief. (J.A. 8-9, Amended Complaint, VII ¶¶4-5.)

Petitioner challenged virtually every condition of confinement at HCF. Petitioner's Amended Complaint alleged: overcrowding (J.A. 4, Amended Complaint ¶ 9), excessive noise (J.A. 4, Amended Complaint ¶ 9), insufficient locker storage space (J.A. 4-5, Amended Complaint ¶ 10), inadequate heat in the winter (J.A. 5, Amended Complaint ¶ 11), inadequate ventilation in the summer (J.A. 5, Amended Complaint ¶ 12), unclean restrooms (J.A. 5, Amended Complaint ¶¶ 14, 15, 16), inmate assignments to dormitories based on improper classifications (J.A. 6, Amended Complaint ¶ 17), and unsanitary dining room and food preparation (J.A. 6, Amended Complaint ¶ 18).

Petitioner filed a motion for summary judgment supported by affidavits signed by five other HCF inmates. (J.A. 1, Journal Entry of 11-10-86). The motion and affidavits raised additional claims of insect infestation and inadequate cooling in the summer. (J.A. 34, 35). Respondents filed a memorandum contra Petitioner's summary judgment motion supported by an affidavit of Homer Friend, the unit manager⁸ of Petitioner's dormitory at HCF. (J.A. 40). Mr. Friend's affidavit documents specific measures taken by HCF to keep the noise level down, to heat and ventilate the facility, to maintain cleanliness in the restrooms and food service area, and to exterminate insects in the institution. Mr. Friend also described the HCF

⁷ Petitioner and the second named plaintiff each sought \$900,000. This amount included \$600,000 in punitive damages and \$300,000 in compensatory damages. (J.A. 8-9, Amended Complaint, VII, ¶¶4,5). State officials are not indemnified for punitive damages. Ohio Rev. Code Ann. §9.86 (Page 1990) (A.1).

⁸ Unit management is an administrative model based on decentralized decision making authority. The unit manager is part of a professional team which works within a particular HCF dormitory. The unit management system attempts to resolve problems expeditiously by allowing inmates to raise personal or institutional concerns immediately. The team includes a social worker and someone from the team is on duty seven days per week for at least twelve hours per day. (J.A. 50).

health screening procedures and the HCF policy for transferring mentally ill inmates to psychiatric programs at other institutions. (J.A. 40-42).

Respondents then filed a cross-motion for summary judgment. (J.A. 1, Journal Entry of 4-16-87). The cross-motion for summary judgment included the affidavit of the health care administrator at HCF who described the medical and psychiatric services provided at HCF, reviewed the medical history of Petitioner, and stated that there were no records of inmates suffering from excessive heat or food poisoning, and that the number of cold-related diseases was normal for this age group. (J.A. 43-44). In addition, he noted that the inmates and prison employees "eat the same food prepared in the same kitchen." (J.A. 43). The motion was also supported by an affidavit of staff counsel for the Ohio Judicial Conference, authenticating an article written for a Judicial Conference publication describing his visit to HCF on October 23, 1986. (J.A. 45-52).

The district court denied Petitioner's motion for summary judgment, granted Respondents' motion for summary judgment and dismissed the action. (J.A. 53). The court found that Petitioner had failed to present a genuine issue of material fact, for the pleadings and affidavits revealed that Petitioner had been provided with "at least the minimal civilized measure of life's necessities" and that the HCF officials did not demonstrate "obdurate or wanton behavior." (J.A. 59).

Petitioner appealed to the Sixth Circuit Court of Appeals, which appointed counsel.⁹ The court of appeals affirmed the lower court's decision, holding that Petitioner's allegations of overcrowding, housing with mentally ill inmates, and inadequate cooling, even if true, were insufficient to establish constitutionally violative conditions. *Wilson v. Seiter*, 893 F.2d 861, 865 (6th Cir.), *cert. granted*, 111 S. Ct. 41 (1990) (J.A.

⁹ The Sixth Circuit Court of Appeals brief was prepared by the appointed counsel.

68). The court found that summary judgment was properly granted on Petitioner's other allegations, for Petitioner's affidavits failed to present sufficient evidence to allow a reasonable jury to conclude that Respondents had acted obdurately and wantonly. *Wilson v. Seiter*, 893 F.2d at 867 (J.A. 74).

Petitioner then sought a writ of certiorari from this Court. This Court granted the petition and the motion to proceed *in forma pauperis* on October 1, 1990. *Wilson v. Seiter*, 111 S. Ct. 41 (1990).

SUMMARY OF ARGUMENT

To show that conditions of confinement inflict cruel and unusual punishment in violation of the Eighth Amendment an inmate must demonstrate that the conditions: (1) constitute punishment, (2) seriously deprive him of basic human needs, and (3) are inflicted by prison officials acting with a wanton and obdurate state of mind. If an inmate fails to present sufficient evidence to create a genuine issue of fact regarding any one of these essential elements the prison officials are entitled to summary judgment. This test strikes the needed balance, protecting inmates' constitutional rights while allowing prison officials flexibility to deal with the practical difficulties of operating our nation's prison systems.

Conditions of confinement can be scrutinized under the Eighth Amendment only if those conditions themselves constitute punishment. A condition of confinement constitutes punishment only if the condition is imposed with an intent to punish or if the condition is not rationally related to an alternate purpose or is excessive in relation to the alternate purpose. *Bell v. Wolfish*, 441 U.S. 520 (1979). None of the conditions of confinement Petitioner complains of constitute punishment. All of the conditions are rationally related to legitimate security, administrative, and fiscal concerns.

The Court in *Rhodes v. Chapman*, 452 U.S. 337 (1981), evaluated a claim that conditions of confinement (double

celling) constituted cruel and unusual punishment. The *Rhodes* Court found that prison officials were entitled to judgment because the inmates failed to show an essential element of their Eighth Amendment claim. The inmates' failure to demonstrate that they were deprived of "the minimal civilized measure of life's necessities" was fatal to their constitutional claim.

Some lower courts, relying on *Rhodes*, have failed to consider prison officials' state of mind when ruling on conditions claims, and have considered only whether the conditions meet the minimal civilized measure of life's necessities. Because the *Rhodes* Court found that inmates were provided with minimal standards of human decency, it went no further in discussing the elements of an Eighth Amendment violation. However, the Court had previously decided Eighth Amendment liability should not be imposed without fault. Prison officials must have acted with a culpable state of mind to be found liable for violating an inmate's constitutional rights. *Estelle v. Gamble*, 429 U.S. 97 (1976).

The Court in *Whitley v. Albers*, 475 U.S. 312 (1986), directed lower courts to consider a state of mind analysis in all Eighth Amendment cases. *Whitley* marked a return to the Court's historical treatment of Eighth Amendment cases, holding that officials can not be found to have inflicted cruel and unusual punishment unless it is shown that they acted with an obdurate and wanton state of mind.

The foregoing test announced by the *Whitley* Court and utilized by the Sixth Circuit requires an inmate to do more than make conclusory allegations of cruel and unusual punishment. It requires the inmate to show a genuine issue of fact that officials' conduct has been persistent and malicious in maintaining prison conditions that deprive an inmate of basic human needs. This test protects the rights of both the inmates and prison officials, while conserving judicial resources.

The Sixth Circuit properly included state of mind as an element of Eighth Amendment claims challenging conditions

of confinement. The Sixth Circuit affirmed summary judgment in favor of the prison officials, finding that there was no evidence that the officials had acted wantonly and obdurately. The Sixth Circuit interpreted wanton and obdurate as persistent malicious cruelty.

The use of persistent malicious cruelty to evidence wantonness and obduracy in an Eighth Amendment conditions case strikes a needed balance. Requiring less would permit liability for an isolated act or omission resulting from inadvertence or error in good faith. This analysis permits prison officials' behavior to be examined in light of their knowledge of deficient conditions, actions taken to cure the deficient conditions, and any barriers to action, financial or otherwise, that would have an impact on the ability to cure the deficient conditions. Moreover, the subjective nature of claims pertaining to conditions of confinement mandate the need for a test giving wide deference to prison officials charged with the responsibility of operating our nation's prison systems.

Obduracy and wantonness can be shown in a conditions case only where an official acted with a degree of malice. Where, as here, prison officials continuously endeavor to maintain decent living conditions within a facility, wantonness and obduracy can not be found. Respondents' efforts to maintain decent living conditions at Hocking Correctional Facility would preclude even a finding of deliberate indifference. Ignoring the prison officials' efforts to provide decent human living conditions in penal institutions and, instead, looking solely at the conditions in existence at the facility would, in effect, impose a strict liability standard for prison conditions claims.

Ohio does not seek to operate prisons without regard to the constitutional rights of prisoners. Indeed, Hocking Correctional Facility is radically different from the inhumane institutions that cause concern for inmates' health and safety. Ohio merely seeks a meaningful test that will allow claims that do not rise to a constitutional level to be resolved without resort to a federal court trial.

ARGUMENT

I. THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE PROHIBITS CONDITIONS OF CONFINEMENT THAT CONSTITUTE PUNISHMENT, DEPRIVE INMATES OF BASIC HUMAN NEEDS, AND ARE CAUSED BY OFFICIALS ACTING WITH A WANTON AND OBDURATE STATE OF MIND

"The deplorable conditions and draconian restrictions of some of our Nation's prisons" have caused the federal courts rightly to "condemn these sordid aspects of our prison systems." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979). This case, however, is "light years removed from the torture, cruel deprivations, and sadistic punishment with which the Cruel and Unusual Punishment Clause is concerned. See *Hutto v. Finney*, 437 U.S. 678, 681-84 and nn. 3-6 (1978)." *Cody v. Hillard*, 830 F.2d 912, 915 (8th Cir. 1987) (en banc), cert. denied, 485 U.S. 906 (1988). *Hutto v. Finney* described conditions that were characterized as a "dark and evil world completely alien to the free world." 437 U.S. at 681.¹⁰ Regardless of what standards are used to analyze conditions cases, nothing in the record in this case even remotely approaches the conditions of confinement that fall below the constitutional standards enunciated in *Rhodes v. Chapman*, 452 U.S. 337 (1981) and *Whitley v. Albers*, 475 U.S. 312 (1986).

A. Prison Conditions Are Not Cruel And Unusual Punishment Where They Provide The Minimal Civilized Measure Of Life's Necessities And Where Conditions Do Not Inflict Wanton And Unnecessary Pain

¹⁰ "[C]onditions [in *Hutto v. Finney*] included: use of five (5) foot long leather straps to whip inmates for minor offenses, use of a device to administer electrical shocks to very sensitive parts of an inmate's body and use of inmate guards authorized to use deadly force against 'escapees' who therefore could murder another inmate with practical impunity. 437 U.S. at 682 nn. 4-6." *Cody v. Hillard*, 830 F.2d at 915.

Petitioner claims that the court of appeals erroneously applied a "malicious and sadistic" intent requirement in support of its affirmance of the district court's entry of summary judgment in Respondents' favor. Petitioner's argument is disingenuous at best for, as is shown in part B, *infra* pp. 26-27, the court of appeals did not utilize a "malicious and sadistic" intent standard in its review of the lower court's decision. Additionally, the court of appeals correctly analyzed the district court's decision within the framework of the restrictions of the Eighth Amendment and determined that conditions at HCF did not constitute cruel and unusual punishment. *Wilson v. Seiter*, 893 F.2d 861 (6th Cir. 1990). (J.A. 62).

1. An Eighth Amendment claim should first be evaluated to determine whether punishment has been inflicted

Evaluating a conditions case under the guidelines of the Eighth Amendment is a difficult task because that provision, and the majority of cases explaining its application, deal with "punishment" in the traditional sense. As this Court advised, the American draftsmen, copying the English Bill of Rights, were "primarily concerned, however, with proscribing 'tortures' and other 'barbarous' methods of punishment." *Gregg v. Georgia*, 428 U.S. 153, 170 (1976) (citing Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 842 (1969)). The focus of many Eighth Amendment cases, therefore, is whether punishment is "cruel and unusual" while the underlying assumption is that the challenged act constitutes punishment.

However, detention in and of itself, is not punishment in the constitutional sense. Furthermore, "not every disability imposed during . . . detention amounts to 'punishment' in the constitutional sense. . . ." *Bell v. Wolfish*, 441 U.S. at 537.¹¹

¹¹ *Bell v. Wolfish* involved pretrial detainees who had not been adjudged guilty of any crime but who were detained to insure their attendance at trial. The parties conceded that detention, by itself, did not constitute punishment so as to give rise to a Fifth Amendment due process claim.

Inquiry into whether a governmental act constitutes punishment involves many questions, including whether the act involves an affirmative disability or restraint, has historically been regarded as punishment, promotes the goals of retribution and deterrence, is directed toward behavior that is a crime, is directed toward an alternative purpose (other than punishment), or appears excessive in relation to its alternate purpose. *Id.* at 537-38.

Therefore, while confinement in prison is subject to Eighth Amendment scrutiny, official acts that do not inflict pain are not punishment and are therefore not forbidden, or even regulated, by the Eighth Amendment. *Rhodes v. Chapman*, 452 U.S. at 348. Conditions of confinement, and specific restrictions on inmates, are not necessarily punishment and, if not, do not invite inquiry under the Eighth Amendment. Some conditions are easy to identify as punitive, such as solitary confinement or loss of privileges. But a court must first decide whether a governmental act is taken for the purpose of punishment or for some other legitimate governmental purpose before moving on to a determination of whether the act is cruel and unusual.

Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination [of whether the act constitutes punishment] generally will turn on "whether an alternative purpose to which (the restriction) may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned (to it).

Bell v. Wolfish, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

The first level of analysis, therefore, should be whether the conditions of Petitioner's confinement constitute the punishment at issue. Petitioner does not contend that Respondents exhibited an intent to punish him by imposing the conditions at HCF of which he complains. Therefore, those conditions do not constitute punishment if they are

rationally related to an alternative purpose and are not excessive in relation to that purpose. The inquiry must "spring from constitutional requirements and . . . judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell v. Wolfish*, 441 U.S. at 539.

Many of Petitioner's complaints stem from the fact that inmates at HCF are housed in open dormitories rather than in private cells with their own restroom facilities. Petitioner complains that inmates are double-bunked, have personal space of less than 50 square feet, and that there is a high noise level caused by other inmates. (J.A. 4, Amended Complaint ¶ 9). He complains that he is subjected to the odor of other inmates' bodies and of the common restrooms because of their proximity to the bunks. (J.A. 34, Wilson affidavit ¶ 9). He complains that the common restroom facilities are inadequately cleaned (J.A. 5, Amended Complaint ¶ 13-16) even though they are thoroughly cleaned twice a day and spot cleaned on an as needed basis. (J.A. 41, Friend affidavit ¶ 15).

Under the standards set out in *Bell v. Wolfish*, 441 U.S. at 537-38, none of the above conditions even constitute punishment. The conditions are rationally related to the decision to house inmates in large dormitories. Clearly the decision to use a dormitory facility is one the Court should defer to prison administrators. The above complaints reflect Petitioner's personal discomfort with the fact that he is housed in a dormitory with one hundred forty inmates. However, the conditions are not excessive in relation to the decision to house inmates in a dormitory facility and therefore do not constitute punishment. The prison administrators' decisions about how to deal with the problems attendant to a dormitory environment¹² should receive deference from

¹² In addition to requiring the restrooms be cleaned twice a day, the prison administrators require that the kitchen area and dining area be cleaned after every meal, assign 57 inmates to kitchen duty, contract with an exterminator twice a month, and require that inmates who work around food wear hats and plastic gloves. (J.A. 41-42). The Court should defer to the decision of the prison officials to utilize inmate labor to clean the facility and prepare and serve the food.

the Court. Since the conditions Petitioner complains of are related to the alternative purpose of operating a dormitory detention facility with prison labor and are not excessive with regard to this purpose, the acts of Respondents do not constitute punishment subject to Eighth Amendment scrutiny.

Similarly, Petitioner does not argue that he has been subjected to temperature extremes intentionally so as to punish him for the crime for which he was incarcerated or an infraction committed in the prison. Furthermore, other than indicating that he has been periodically subjected to 95° temperatures in the summertime,¹³ Petitioner does not specify the temperature extremes inside the building, other than to claim that they are "cold" and "frigid." (J.A. 33-34). Being subjected to 95° temperatures in the summertime is a condition encountered by many Ohio residents who do not live in air conditioned homes. Certainly the decision to install air conditioning springs from legitimate governmental economic interests attendant to the effective management of a detention facility and cannot be considered to be punishment. "[A] state's interest in reasonably limiting the cost of a detention facility is a legitimate governmental objective in the framework of the *Bell v. Wolfish* standard" *Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986). Petitioner has never claimed that the building is not heated in the wintertime, merely that the heating and insulation are inadequate. Furthermore, Petitioner's subjective opinion that temperatures are "cold" and "frigid" when considered along with the objective fact that the heaters are serviced and in good working order (J.A. 41) cannot support a claim that the air temperature constitutes punishment.

¹³ Petitioner does not claim that he has suffered from heat related rashes or breathing difficulty but, rather, that other inmates have suffered from these physical ailments. As previously noted, this case is not a class action and, therefore, Petitioner may not allege the injuries of other inmates in support of his cause of action.

2. Conditions of confinement that constitute punishment must be objectively evaluated to determine whether an inmate has been seriously deprived of basic human needs

Because conditions of confinement do not fit neatly into the definition of "punishment," the Court looks at the general principles enunciated in other Eighth Amendment cases in order to establish a framework in which to evaluate prison conditions cases. In *Rhodes v. Chapman* the Court emphasized that, because of the flexibility of the Eighth Amendment, courts must look at " 'evolving standards of decency that mark the progress of a maturing society.' " 452 U.S. at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). It is no longer only those punishments that are physically barbarous which are prohibited but those which "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. at 173. "Unnecessary and wanton" means punishment that is "totally without penological justification." *Id.* at 183.

Conditions that constitute cruel and unusual punishment involve the "serious deprivations of basic human needs" and "deprive inmates of the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. at 346. A court's determination of this issue should not be based on the subjective views of judges and, even though a court's judgment will "be brought to bear on the question of the acceptability of a given punishment," that judgment "should be informed by objective factors to the maximum possible extent." *Rhodes v. Chapman*, 452 U.S. at 346 (citations omitted).

Assuming the truth of Petitioner's objective allegations, he has not been deprived of the minimal measure of life's necessities nor has he suffered a serious deprivation of basic human needs. Taken at the furthest extreme, Petitioner claims that he lives in a crowded, noisy dormitory that is too cold in the winter and too hot in the summer, that the inmates who clean the restrooms do not do a very good job and the inmates who provide food service do not keep things

clean enough. Petitioner also claims that the inmate population includes sick prisoners, both physically and mentally, because the rules on inmate classification have not been followed. Brief of Petitioner at 3.

Contrast the above allegations with the situation present in *Hutto v. Finney*, 437 U.S. 678, where the prison officials admitted that the conditions of "punitive isolation" constituted cruel and unusual punishment. At the Arkansas prison, from four to eleven prisoners were "crowded into windowless 8' x 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell." *Id.* at 682. Prisoners with hepatitis and venereal disease were celled together and their bedding was jumbled together each morning, and indiscriminately returned at night. They were fed a 1,000 calorie a day diet of "grue", a substance created by "mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan." *Id.* at 682-683. See *supra* p.8 n.10. For punishment purposes, inmates were sentenced to these punitive isolation cells with no reprieve for lengthy, indeterminate periods of time. *Id.*

In contrast, Petitioner was provided with considerable freedom within a facility that includes a lounge for snacking and visitation, (J.A. 48) special television rooms, (J.A. 40), gymnasium, pool room, weight room and prison library (J.A. 49). Inmates must periodically report to their bunks for a head count but otherwise are allowed to choose their own activities. (J.A. 49). Certainly Petitioner's claims that "[e]ven though C dorm appears to be clean, it is not" and that HCF extermination is inadequate as there are wasps, yellow jackets, roaches, mice, mosquitoes and spiders (J.A. 35), does not involve the serious deprivation of human needs standard set out in *Rhodes*.

3. An Eighth Amendment claim must also be evaluated to determine whether prison officials acted with a culpable state of mind, for to hold otherwise would impose strict liability on prison officials

Petitioner claims that the Court in *Rhodes* rejected any kind of intent or state of mind analysis for a conditions case. Even though, Petitioner admits, an analysis of intent may be appropriate for other Eighth Amendment cases such as a claim for failure to provide medical care, *Estelle v. Gamble*, 429 U.S. 97 (1976),¹⁴ or excessive use of force, *Whitley v. Albers*, 475 U.S. 312, Petitioner argues that the Court should not incorporate any state of mind test into the Eighth Amendment analysis of prison conditions. Petitioner urges closer scrutiny and less deference to state officials in an analysis of prison conditions because, he claims, they do not involve split-second decisions regarding safety nor must they be weighed against other important governmental interests. Brief of Petitioner at 12-13. Furthermore, Petitioner claims that there is a need for a uniform national standard against which the conditions in all prisons may be evaluated. Brief of Petitioner at 24. Petitioner's approach disregards the officials' state of mind. This effectively imposes strict liability on prison officials, requiring them to maintain minimal standards of human decency as defined by the federal courts

¹⁴ The "deliberate indifference" standard of *Estelle v. Gamble* unquestionably involves an examination of the state of mind of the prison official. Nonetheless, Petitioner inconsistently argues that a state of mind analysis has no place in a conditions case. Brief of Petitioner at 23-26. Not only is Petitioner's argument in his merits brief internally inconsistent, but Petitioner actually concedes in his Petition For A Writ of Certiorari that a state of mind analysis was appropriate in all Eighth Amendment cases, including conditions cases; Petitioner merely takes issue with the applicable state of mind standard.

In this case, the Sixth Circuit failed to apply *Whitley* correctly. The Sixth Circuit failed to recognize that the "obdurate and wanton" state of mind requirements of *Whitley* for all Eighth Amendment violations encompass both the "deliberate indifference" and the "malicious and sadistic intent" standards. Which of the two "obdurate and wanton" state of mind requirements applied depends on the circumstances.

Petition For Writ Of Certiorari at 32-33. Petitioner's argument that the Court should abandon a state of mind analysis altogether for conditions cases was not a part of the Questions Presented For Review in the Petition and should not be heard by this Court. *Sup. Ct. R.* 14.1(a). (A.2).

and organizations such as the American Correctional Association and the American Public Health Association. See Brief of Amicus Curiae American Public Health Association.

Contrary to Petitioner's argument, the Court in *Rhodes* did not reject a state of mind analysis for conditions cases. A more reasonable reading of the decision, especially in light of the fact that it was decided in a short time period that began with *Estelle v. Gamble* and ended with *Whitley v. Albers*, is that the state of mind of the prison officials was never an issue in *Rhodes* because the Court found that the conditions at the Southern Ohio Correctional Facility (SOCF) satisfied the minimal civilized measure of life's necessities. Therefore, respondents could not show one of the necessary elements of the constitutional claim. The Court admonished that the determination of cruel and unusual punishment should not be merely the product of the subjective view of judges. *Rhodes v. Chapman*, 452 U.S. at 346. This is certainly not a rejection of the use of an inquiry into the state of mind of the officials in conditions cases. Indeed the Court in *Rhodes v. Chapman* looked to "Eighth Amendment precedents for the general principles that are relevant to a State's authority to impose punishment for criminal conduct" *id.* at 345, including the "unnecessary and wanton infliction of pain." *Id.* at 346. The Court did not, as Petitioner suggests, formulate a new test for conditions cases.

The state of mind requirement is an essential component of any meaningful test for conditions that do not involve a threat to bodily integrity, pain, injury, or loss of life. Use of a state of mind analysis logically assists in differentiating between conditions that are unconstitutional from those "restrictive and even harsh" conditions permitted by *Rhodes*. 452 U.S. at 347.

Analysis of Eighth Amendment cases has historically involved a discussion of the official's intent, and still does today. In *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Court rejected a convicted murderer's claim that it would constitute cruel and unusual punishment to execute him after a first attempt had failed. "There is no

purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." *Id.* at 464. Furthermore, as previously noted, *Estelle v. Gamble* and *Whitley v. Albers* both utilize a state of mind analysis. In *Graham v. Connor*, 109 S. Ct. 1865 (1989), the Court compared the Eighth Amendment prohibition against cruel and unusual punishment with the Fourth Amendment prohibition of unreasonable searches and seizures. The Court recited the fact that subjective state of mind is relevant to an Eighth Amendment claim as established hornbook law: "the terms 'cruel' and 'punishment' clearly suggest some inquiry into subjective state of mind, whereas the term 'unreasonable' does not". *Id.* at 1873.¹⁵

There is no reason to disregard prison officials' state of mind when a federal court reviews claims that general prison conditions are unconstitutional, but to consider state of mind when reviewing claims that medical treatment was withheld or that excessive force was used. Refusal to provide medical treatment can "produce physical 'torture or a lingering death'" or, in a less severe case "result in pain and suffering." *Estelle v. Gamble*, 429 U.S. at 103 (quoting *In Re Kemmler*, 136 U.S. 436, 447 (1890), overruled by *Gregg v. Georgia*, 428 U.S. 153 (1976)). Even more clear is that use of force can cause "severe [physical] damage . . . and mental and emotional distress." *Whitley v. Albers*, 475 U.S. at 317. Furthermore, officials' failure to protect an inmate can also result in pain and suffering and even death. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823 (1988). The discomfort caused by conditions of confinement do not merit closer review and less deference than decisions of prison officials involving acts or omissions that are life or health threatening. Petitioner's argument that a claim that general conditions of confinement should be subject to broader scrutiny by the Court is not consistent

¹⁵ In a separate concurring opinion, Justices Blackmun, Brennan and Marshall did not take issue with the majority's conclusion that the Eighth Amendment requires a subjective state of mind analysis. *Graham v. Connor*, 109 S. Ct. at 1873-74.

with the language and purpose of the Eighth Amendment.

Petitioner claims that the cases cited in footnote 17 of *Rhodes v. Chapman*, 452 U.S. at 352, support his claim that the Court rejected a state of mind analysis in conditions cases. Petitioner argues that the cited circuits relied only on objective conditions at the detention facilities to determine that those conditions constituted cruel and unusual punishment. Petitioner's claim is misplaced; this Court merely referred to the cases in footnote 17 as examples of state institutions that were subject to federal court orders.

Petitioner further argues that in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), the court rejected the State's arguments that they "had made good faith efforts to remedy the constitutional violations." Brief of Petitioner at 25. But the "efforts" referenced in the court's decision were actually efforts to construct and open a new facility, which facility was not yet in operation. Of course construction of a new prison would not be relevant to the conditions at an older existing facility. Similarly, Petitioner's citation to *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) does not support his claim that all good faith efforts of prison officials are irrelevant in a conditions claim. In *Gates*, the court merely held that improvement efforts made after suit was filed would not be cause to deny relief to the inmates because there was no assurance that improvements would be maintained:

"When defendants are shown to have settled into a continuing practice . . . courts will not assume that it has been abandoned without clear proof. . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."

Id. at 1321 (quoting *United States v. Oregon Medical Society*, 343 U.S. 326, 333 (1952)).

Respondents do not ask, nor did the court of appeals hold, that it would be appropriate to defend themselves by arguing that they would provide another, better facility in the future (*Ramos*) or that, after suit, they cleaned things up at HCF (*Gates*). Instead, Respondents defended themselves on the basis that prior to the filing of Petitioner's lawsuit they had taken best efforts and provided decent living conditions for the inmates at HCF. This state of mind consideration is appropriate in a conditions case just as it is in other Eighth Amendment cases.

Petitioner also claims that closer federal court scrutiny is appropriate because prison security is not an issue in a prison conditions case. This claim is undermined by the nature of Petitioner's own complaints. For example, the decision to utilize inmate labor as food service and custodial workers implicates a decision to have fewer, non-guard employees in the facility on a daily basis. This, and the decision to exterminate twice a month instead of more frequently, reflects concern about the security of the facility, the personal safety of non-inmates, and the potential for smuggling contraband into the institution. Indeed, Petitioner's Amended Complaint and affidavits in this action provide numerous examples of conditions claims that involve security questions for which prison administrators must be provided wide latitude. Two of the more obvious examples are: classification issues, (J.A. 6, Amended Complaint ¶ 17), and security of fire exits and "crash gates," (J.A. 13, Cassidy Affidavit ¶ 18), (J.A. 18, Griffin Affidavit ¶ 16), (J.A. 21, Vinson Affidavit ¶ 12), (J.A. 25, Bock Affidavit ¶ 18).

Moreover, security is not the only countervailing governmental interest implicated in a conditions case. The decision to house inmates in a dormitory environment implicates important government interests. Furthermore, the financial interests of the State are also implicated in the public officials' decision to provide the most efficient, cost effective management of the facility possible. *Hamm v. DeKalb County*, 774 F.2d at 1573.

Petitioner's claim that, unless the Court rejects a state of

mind analysis for conditions cases, "there will be no uniform constitutional standard for the nation," Petitioner's Brief at 24, ignores the fact that all other Eighth Amendment claims require utilization of a state of mind analysis. If Petitioner is suggesting that the Court should adopt specific standards for prison facilities across the nation, this would not only violate the axiom that specific conditions involve considerations "properly [] weighed by the legislature and prison administration rather than a court" *Rhodes v. Chapman*, 452 U.S. at 349, but also the admonition that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 346 (quoting *Trop v. Dulles*, 356 U.S. at 101). Indeed, the Court has rejected the use of the American Public Health Association's Standards for Health Services in Correctional Institutions to establish constitutional mandates:

[W]hile the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather they establish goals recommended by the organization in question. For this same reason, the draft recommendations of the Federal Corrections Policy Task Force of the Department of Justice regarding conditions of confinement for pretrial detainees are not determinative of the requirements of the Constitution.

Bell v. Wolfish, 441 U.S. at 543-44 n. 27. See also *Rhodes v. Chapman*, 452 U.S. at 349 n. 13. The American Public Health Association's Standards have again been lodged with the Court for its reference in this case by *amicus curiae* American Public Health Association.

Analysis of conditions cases solely on the basis of objective standards as urged by Petitioner is not possible because unlike statutory punishments for criminal acts, prison conditions are not specifically established by legislative acts. The " 'objective indicia' derived from history, the action of

state legislatures, and the sentencing by juries," *Rhodes v. Chapman*, 452 U.S. at 346-47, do not provide the determinative test necessary for a conditions case.¹⁶

4. In an Eighth Amendment case, each challenged condition must constitute cruel and unusual punishment

The plethora and variety of Petitioner's complaints (as opposed to focusing on an individual complaint or several specific complaints) indicate Petitioner actually grounds his Eighth Amendment claim on a "totality of the circumstances" theory. Brief of Petitioner at 36-39. Under the "totality of the circumstances" analysis a prisoner claims that, while there is no single condition which causes the prisoner to suffer cruel and unusual punishment, the overall conditions create an atmosphere that causes physical or, more commonly, emotional suffering. Some courts have applied a totality of the circumstances analysis to determine whether overall conditions, when taken in combination, heighten the punishment. Under this analysis, although individual conditions by themselves are not cruel and unusual, the total effect of the conditions renders the punishment cruel and unusual. Totality of the circumstances was incorrectly utilized by the *Rhodes* district court when it reviewed conditions at the Southern Ohio Correctional Facility in 1977:

The question is constantly stated as one of ascertaining the "totality of the circumstances" of the particular case and then inquiring into whether the totality as determined is intolerant or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience.

¹⁶ The *Rhodes* Court did not direct the use of the objective indicia listed in their opinion for a conditions case, it merely used those factors as examples the Court utilized in deciding whether capital punishment for certain crimes met contemporary standards. 452 U.S. at 347.

Chapman v. Rhodes, 434 F.Supp. 1007, 1019 (S.D. Ohio 1977) *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981).

A totality of the circumstances inquiry involves, to an unjustifiable degree, the subjective judgment of a federal court as to what is intolerable, unreasonable, and shocking to the modern conscience. Applying totality of the circumstances also fails to utilize a traditional Eighth Amendment analysis to examine each individual condition and determine whether punishment is inflicted that is cruel and unusual. The test was implicitly rejected by this Court in *Rhodes* when it reversed the decision of the lower courts.¹⁷

5. Failing to consider the efforts taken by prison officials to provide for prisoners' basic human needs imposes strict liability

Adoption of Petitioner's argument that the Court should ignore the prison officials' efforts to provide for prisoners' basic human needs and should instead look solely at the conditions in existence at the facility would, in effect, impose strict liability for prison conditions claims. States and prison officials would be subject to claims that they had inflicted "cruel and unusual punishment" on inmates no matter how much effort they undertook to provide adequate living conditions under contemporary standards of human decency. A strict liability type argument was rejected by the Court in *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, and should be rejected for purposes of a prison conditions case.

¹⁷ In a separate concurring opinion Justices Brennan, Blackmun and Stevens said the language in the majority opinion at 347 indicated the majority utilized a totality of the circumstances test. 452 U.S. at 363 n. 10. However, this is inconsistent with the majority's instructions to use "objective criteria" to the greatest extent possible. See *Hoptowit v. Ray*, 682 F.2d 1237, 1246 n. 3 (9th Cir. 1982) ("In light of the [*Rhodes*] Court's specificity, it is unlikely the Court would hold that the totality of conditions at a prison may constitute an Eighth Amendment violation. The *Rhodes* rationale suggests that the Court would require evidence of specific conditions amounting to one of the enumerated deprivations.")

Petitioner argues in favor of applying what amounts to a strict liability standard for Eighth Amendment conditions cases. This would require prison officials to defend themselves in a trial, from claims for both monetary and injunctive relief, whenever inmates claim the government has failed to meet inmates' basic human needs. This would create enormous barriers to the states' ability to operate their prisons. Brief of Petitioner at 25 n. 23.

These barriers are illustrated by a particularly appropriate hypothetical raised by the United States of the dilemma created by the breakdown of a prison boiler during a cold winter. See Brief of the United States as *Amicus Curiae* at 19 n. 16. Whether the condition is a temporary problem that officials have attempted to remedy, or cruel and unusual punishment, can only be determined by examination of the state of mind and actions of the named defendants. Petitioner's proposed standard would subject officials to strict liability for any equipment failure. Consequently, under Petitioner's proposed standard, state officials, despite all good faith efforts to maintain decent living conditions for inmates in their state's detention facilities, face the possibility of successful litigation that reasonably could include damages for actions beyond their control. This result is unquestionably in conflict with this Court's precedents and the basic precepts of the Eighth Amendment.

B. Prison Conditions That Are Not Imposed In A Wanton And Obdurate Manner Do Not Violate The Eighth Amendment Prohibition Against Cruel And Unusual Punishment

Not every governmental action affecting the interests or well being of a prisoner is subject to Eighth Amendment scrutiny. As this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977) stated: "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Id.* 430 U.S. at 670 (quoting *Estelle v. Gamble*, 429 U.S. at 103 and *Gregg v. Georgia*, 428 U.S. at 173). In *Whitley v. Albers*, this Court clarified that underlying the decision in

Estelle v. Gamble was the following understanding of the Cruel and Unusual Punishment Clause: "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. at 319. The Court stated that harsh conditions are part of the price convicts must pay for their offenses against society. *Id.* Not every hardship or harsh act will constitute cruel and unusual punishment. *Rhodes v. Chapman*, 452 U.S. at 347.

1. Where prison officials have provided for inmates' basic human needs prison officials could not have been deliberately indifferent

In *Estelle v. Gamble*, the Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." 429 U.S. at 104 (citation omitted). The Court clarified that "an inadvertent failure to provide medical care can not be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Id.* at 105-06.

Even if this Court is inclined to review Petitioner's confinement claims under a deliberate indifference standard, Respondents' actions evidence good faith efforts that unquestionably preclude recovery by Petitioner. (J.A. 40-42, Friend Affidavit), (J.A. 43-44, Patton Affidavit). See *infra* pp. 41-43. Respondents' efforts herein, when compared to *Estelle v. Gamble* (blatant refusal to provide medical care to an inmate who repeatedly complained of a back injury), evidences an absence of behavior that was deliberate or indifferent. Based on the factual record Respondents' actions can not rise to the level cognizable under the Eighth Amendment "deliberate indifference" standard.

2. After *Whitley v. Albers* all Eighth Amendment claims must be evaluated under a wanton and obdurate state of mind standard

Whitley v. Albers marked a new era in Eighth Amendment jurisprudence. The *Whitley* Court clarified that a state of mind analysis governs *all* varieties of Eighth Amendment claims. The *Whitley* Court carefully pointed out:

[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing *conditions of confinement*, supplying medical needs, or restoring official control over a tumultuous cellblock.

475 U.S. at 319 (emphasis added).¹⁸ In *Whitley* the Court rejected the application of negligence standards to Eighth Amendment claims. "We think the Court of Appeals effectively collapsed the distinction between mere negligence and wanton conduct that we find implicit in the Eighth Amendment. Only if ordinary errors of judgment could make out an Eighth Amendment claim would this evidence create a jury question." *Whitley v. Albers*, 475 U.S. at 322. See also *Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property") (emphasis in original); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) ("the protections of the Due Process Clause, whether procedural or substantive, are simply not triggered by lack of due care by prison officials").¹⁹

¹⁸ Justice O'Connor, joined by Rehnquist C.J., and Kennedy J., subsequently objected to the Second Circuit's attempt to limit *Whitley* to full-blown prison riots. *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988), cert. denied, 489 U.S. 1034, 109 S. Ct. 1095 (1989) (mem.) (O'Connor J., dissenting).

¹⁹ Since "the concerns underlying the Due Process Clause are broader than those underlying the Eighth Amendment," *Davidson v. Cannon*, 474 U.S. at 355 n. 3 (Blackmun J., dissenting), it is clear that if negligence could not state a cause of action under the Due Process Clause, likewise, it could not state a cause of action for any type of Eighth Amendment claim.

3. Wanton and obdurate behavior for Eighth Amendment conditions of confinement claims requires a showing of malice

The question remaining for examination by this Court²⁰ is whether the Sixth Circuit applied the appropriate standard in reviewing the conditions at HCF. Petitioner spends much time attempting to topple a strawman he has created by mischaracterizing the Sixth Circuit's opinion. Petitioner would have this Court believe that the Sixth Circuit applied the *Whitley v. Albers* "malicious and sadistic for the very purpose of causing harm" analysis when examining the conditions at HCF. Brief of Petitioner at 13-20. The Sixth Circuit actually applied the "obduracy and wantonness" analysis from *Whitley*:

Initially, it is noteworthy that we have applied

²⁰ Respondents recognize "[T]he 'decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition.' " *City of Canton, Ohio v. Harris*, 109 S. Ct. 1197, 1202 (1989) (citing *St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, *reh'g denied*, 473 U.S. 925 (1985)). However, a careful review of the lower court's opinion reveals that, regardless of the outcome, the parties herein will not be directly affected. The lower court, after reviewing all the evidence concluded: "At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim." *Wilson v. Seiter*, 893 F.2d at 867 (J.A. 73) (emphasis added).

Since it is clearly established that negligence can not state a claim for violation of the Eighth Amendment, see *supra* p.25, consideration of this issue would amount to an advisory opinion, a result which has consistently been rejected by this Court. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3050 (1989). This case does not present the Court with the kind of factual basis the Court normally requires as a predicate for adjudication of a novel and serious constitutional issue. See *Estelle v. Gamble*, 429 U.S. at 115 (Stevens, J., dissenting). Consequently, Respondents question whether certiorari has been improvidently granted. See Respondents' Brief in Opposition to Certiorari at 18.

Whitley's "obduracy and wantonness" standard to eighth amendment challenges to confinement conditions. In *Birrell v. Brown*, 867 F.2d 956 (6th Cir. 1989), we noted that "[i]n addition to producing evidence of seriously inadequate and indecent surroundings, a plaintiff must also establish that the conditions are the result of recklessness by prison officials and not mere negligence or oversight." *Id.* at 958.

Wilson v. Seiter, 893 F.2d at 866 (J.A. 71).

Nowhere in the entire text of the lower Court's opinion does the term "sadistic" appear. The court analyzed the affidavits and counter-affidavits first under *Rhodes v. Chapman* and then under the *Whitley v. Albers* "wantonness and obduracy" standard. In summary the court stated: "Nothing in the appellants' affidavits implies that the appellees used confinement conditions to punish the appellants. To the contrary, the evidence shows action on the appellees' behalf to maintain decent conditions at HCF." *Wilson v. Seiter*, 893 F.2d at 867 (J.A. 73). The court immediately thereafter stated: "Additionally, the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty." *Id.* Apparently, it is this single sentence that comprises the focus of Petitioner's challenge.

No interpretation of the lower court's opinion can lead to the conclusion that the *Whitley* "malicious and sadistic" standard was utilized in evaluating the conditions at HCF. A more reasonable interpretation of the lower court's decision evidences careful adherence to the *Whitley* "wantonness and obduracy" standard, requiring something less than "malicious and sadistic" and more than mere negligent conduct.

Petitioner argues that there are only two possible approaches to Eighth Amendment claims, the "deliberate indifference" or the "malicious and sadistic" intent standards. Brief of Petitioner at 14-15. This conclusion is unreasonable

in light of the Court's guidance for analyzing Eighth Amendment challenges. In *Rhodes v. Chapman*, 452 U.S. at 345-46, the first conditions case considered by the Court,²¹ it was stated that: "The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be 'cruel and unusual.' The Court has interpreted these words 'in a flexible and dynamic manner,' *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (joint opinion)." Clearly, the Court intended for the Cruel and Unusual Punishment Clause to be applied in a dynamic and fluid manner.

It is " 'obduracy and wantonness' not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . ." *Whitley v. Albers*, 475 U.S. at 319. How the terms "obduracy and wantonness" should be viewed in the context of a prison conditions case has yet to be directly defined by this Court. Petitioner argues that either no state of mind analysis or, alternatively, a "deliberate indifference" standard, should define the standard of review in the prison conditions context. Petitioner advocates application of a "deliberate indifference" standard arguing a supposed lack of security concerns to be weighed by prison officials in conditions cases. Consequently, Petitioner argues, this case should be viewed as more akin to a medical claim that uses "deliberate indifference", than a riot claim that uses a "malicious and sadistic for the very purpose of causing harm" standard. Although this argument has some surface appeal, it fails to recognize that many of the claims comprising conditions challenges inevitably encompass security concerns. See *supra* p. 19.

Typically, the use of "deliberate indifference" to judge the conduct of prison officials has been limited to cases involving

²¹ In *Rhodes v. Chapman*, the Court examined for the first time a dispute over conditions of confinement. 452 U.S. at 345. In the only conditions case previously heard by this Court, *Hutto v. Finney*, the state prison administrators admitted that the conditions constituted cruel and unusual punishment. *Rhodes v. Chapman*, 452 U.S. at 345 n. 11.

personal injury of a physical nature including either failure to protect which has led to injury, or failure to provide medical care to treat a serious medical need which led to injury. In either failure to protect or medical claims the result is a physical injury with concomitant pain. Conditions cases, on the other hand, while they may involve discomfort, do not involve the detriment to bodily integrity, pain, injury, or loss of life typically found in a failure to protect or medical claim. Conditions which are merely unpleasant, even if intensely so, are not subject to Eighth Amendment scrutiny. *Rhodes v. Chapman*, 452 U.S. at 348. A condition of confinement, consequently, should not be elevated to the level of a constitutional question unless it is created or maintained by a prison administrator with malicious intent.

Moreover, application of the "deliberate indifference" standard in a conditions case could easily conflict with two long recognized concepts of the Court. First, "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes*, 452 U.S. at 349 n. 14; *Whitley v. Albers*, 475 U.S. at 321. Second, "prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. at 547.

Prison officials should not be subject to liability under the Eighth Amendment for prison conditions absent a showing of malicious conduct. Malice is a concept that is subsumed within the "obduracy and wantonness" test. The term "wanton" appropriately encompasses a malicious act. It was used for that purpose by the *Whitley* Court, and the definition of "wanton" also incorporates an element of malice:

Wanton: Reckless, heedless, *malicious*, characterized by extreme recklessness or foolhardiness; recklessly disregarding of the rights or safety of others or of consequences.

Black's Law Dictionary 1582 (6th ed. 1990) (emphasis added).

"Malice," the root word from which "malicious" takes its meaning, has been defined in a legal sense, in recent years to mean:

Malice: The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. . . . Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.

Black's Law Dictionary 956-57 (6th ed. 1990).

Even if this Court focuses on the statement that "obduracy and wantonness requires behavior marked by *persistent malicious cruelty*," *Wilson v. Seiter*, 893 F.2d at 867 (J.A. 73) (emphasis added), independent from the balance of the lower court's opinion, this standard serves to strike a needed balance. Conditions of confinement take into account issues that are subjective and open to interpretation. While prisons are traditionally far from luxurious the subjective nature of claims pertaining to conditions of confinement mandate the need for a test giving wide deference to prison officials charged with the responsibility of running a penal facility.

The lower court decided the appropriate analysis, in light of the "wantonness and obduracy" standard, should encompass two essential elements. First, the condition had to be "persistent", reasonably meaning something more than an isolated act or omission. It is reasonable to require more than an isolated act or omission to impose liability in a conditions case.²² To hold otherwise would permit liability

²² See *City of Canton, Ohio v. Harris*, 109 S. Ct. 1197, 1210 (1989) (O'Connor J., concurring in part and dissenting in part) ("As the authors of the Ku Klux Klan Act themselves realized, the resources of local government are not inexhaustible. The grave step of shifting of those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident."). See also *McGhee v. Foltz*, 852 F.2d 876, 880 (6th Cir. 1988) (citing *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980)); *Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986); *Woodhous v. Commonwealth of Virginia*, 487 F.2d 889, 890 (4th Cir. 1973).

for an isolated act or omission resulting from "inadvertence" or an "error in good faith" contrary to the holding of *Whitley v. Albers*, 475 U.S. at 319.²³ Second, the condition must result from behavior which was "maliciously cruel." Requiring a showing of a malicious state of mind provides deference to the day to day decision making necessary to allow prison officials to operate a penal facility. These two elements together serve to strike a balance, allowing the court to examine prison officials' behavior in light of their knowledge of deficient conditions, actions taken to cure the deficient conditions, and any barriers to action, financial or otherwise, that would impact on the ability to cure the deficient conditions.

Claims of discomfort cannot state a constitutional deprivation. The Eighth Amendment is not a protection against petty complaints, and prisoners should not be encouraged to use the federal courts as arbiters of grievances that amount only to inconveniences in their living environment. States can forever improve the quality of living conditions by increasing the amount of money spent on a detention facility. However, "a state's decision to maintain at a reasonable level the quality of food, living space, and medical care rather than improve or increase its provisions of those necessities serves a legitimate purpose: to reasonably limit the cost of detention." *Hamm v. DeKalb County*, 774 F.2d at 1573. See also *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (costs often constrain officials' ability to act).

The officials at HCF have provided Petitioner with "the minimal civilized measure of life's necessities" mandated under the Eighth Amendment as evidenced by "the

²³ Some conditions of confinement can only rise to the level of cruel and unusual punishment if they are "persistent" and imposed maliciously. For example, deprivation of heat, during the winter, could amount to an Eighth Amendment violation based on the duration and reason for the deprivation. If, however, the deprivation was premised on equipment failure, and was remedied by officials in good faith, no persistence would exist and no liability should be found.

contemporary standard of decency," *Rhodes v. Chapman*, 452 U.S. at 347, and Respondents are not required to provide more. Petitioner has not been denied any basic human necessity upon which an Eighth Amendment claim could be premised. Simply stated, Petitioner is dissatisfied with the living conditions at HCF, in particular with the dormitory style arrangement. But his claims, even if taken as truthful, were properly characterized by the lower court as "[a]t best, . . . evidenc[ing] negligence on appellees' parts in implementing standards for maintaining conditions." *Wilson v. Seiter*, 893 F.2d at 867 (J.A. 73). Both the persistent nature of the complaint and the intent of the state official are necessary and relevant inquiries in a 42 U.S.C. §1983 action.²⁴

Petitioner would leave this Court with the impression that three circuits (First, Ninth, and Eleventh) have adopted a

²⁴ A litigant bringing a post-*Whitley* Eighth Amendment claim must allege acts constituting "obduracy and wantonness" on the part of a governmental official. *Whitley v. Albers*, 475 U.S. at 319. The elements of the cause of action are not conditioned on whether injunctive or damage relief is sought. *Duchesne v. Sugarman*, 566 F.2d 817, 831 (2d Cir. 1977) stated:

A §1983 plaintiff's burden does not vary depending upon whether he is seeking injunctive or monetary relief; the elements of the cause of action remain precisely the same. In both instances he must prove that the defendant caused him to be subjected to a deprivation of constitutional rights.

Section 1983 was enacted by Congress in 1871 to address intentional acts of violence where "those who represent a state in some capacity were unable or unwilling to enforce a state law." *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (emphasis in original). Thus, from its very inception, the element of some degree of intent has been required to state a §1983 claim. Further, since intent is a necessary element to prove liability in a 42 U.S.C. §1983 action for violation of the Eighth Amendment prohibition on cruel and unusual punishment, whether the action is for damages or injunctive relief, Petitioner's argument that different standards should be applied based on the relief sought must be rejected. Brief of Petitioner at 23 n. 22; Brief of United States as *Amicus Curiae* at 7 n. 3. Moreover, it must be kept in mind that Petitioner herein requests both damages and injunctive relief. (J.A. 8-9, Amended Complaint, VII ¶¶1-6).

"deliberate indifference" standard in reviewing prison conditions cases.²⁵ Brief of Petitioner at 19-20 & nn. 18-20. Further, Petitioner would lead this Court to believe that the Sixth Circuit applied a standard rejected by five other circuits (Fourth, Fifth, Eighth, Tenth and District of Columbia) in prison condition cases.²⁶ Brief of Petitioner at 15-19 & nn. 13-17. These statements are based upon a mischaracterization of the lower court's decision and an imprecise reading of the

²⁵ Petitioner asserts that the First, Ninth, and Eleventh Circuits applied the "deliberate indifference" standard to conditions of confinement cases. Brief of Petitioner at 19 nn. 18-20. However, it is revealing that the cases referred to by Petitioner are primarily not conditions of confinement cases. See *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988) (psychiatrically disturbed inmate killed after transfer to general population, claim of failure to protect); *Noll v. Carlson*, 809 F.2d 1446 (9th Cir. 1987) (dismissal of *pro se* inmate complaint for failure to protect); *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990) (potential asbestos exposure, medical claim); *Evans v. Dugger*, 908 F.2d 801 (11th Cir. 1990) (paraplegic inmate needing special facilities to accommodate his medical condition, court equivocal about whether to characterize as a medical or conditions claim).

²⁶ Petitioner argues that the Fourth, Fifth, Eighth, Tenth, and District of Columbia Circuits reject an application of the "malicious and sadistic" standard in a prison conditions context. However, the cases cited from the Eighth, Tenth and District of Columbia Circuits in support of this proposition are not conditions cases. *Wright v. Jones*, 907 F.2d 848 (8th Cir. 1990) (failure to protect case involving an inmate assaulted by another inmate, court applied "reckless disregard of a known risk" standard); *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990) (failure to protect case involving the death of a convict awaiting sentencing); *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987) (failure to protect case involving an inmate assaulted by another inmate). The facts in the Fourth Circuit case relied upon by Petitioner, *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) demonstrate that although the court applied a deliberate indifference standard, the defendant acted "wantonly and obdurately" by intentionally refusing to provide adequate useable toilet facilities for a paraplegic inmate. While the Fifth Circuit in *Foulds v. Corley*, 833 F.2d 52 (5th Cir. 1987) declined to extend the *Whitley* "malicious and sadistic" standard to a conditions case, the Court went on to "apply the now traditional eighth amendment standard: was the infliction of pain 'unnecessary and wanton?' See, e.g., *Whitley*, 475 U.S. at 319." *Foulds*, 833 F.2d at 55.

circuit court cases. The cases relied on by Petitioner in six of the eight circuits are not conditions cases. See Brief of Petitioner at 15-19, nn. 13-17.

Upon closer examination of the circuit courts' consideration of Eighth Amendment conditions cases, it is clear that the lower court's use of a "persistent malicious cruelty" standard is not inconsistent with the greater weight of authority. Moreover, the Sixth Circuit is not alone in its extension of a modified *Whitley v. Albers* test to other Eighth Amendment contexts. At least three other circuits have extended the *Whitley* Court's reasoning.

In *Corselli v. Coughlin*, 842 F.2d 23 (2d Cir. 1988) the Second Circuit considered a use of force Eighth Amendment claim. The court applied the *Whitley* standard even though *Whitley* was distinguishable on its facts, since *Corselli* did not involve a full-scale prison riot. "[N]evertheless, the test under *Whitley* applies, that is, 'whether the [prison security] measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm." ' " 842 F.2d at 26 (bracketed material in original) (citing *Whitley*, 475 U.S. at 320-21; *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)). See also *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988), cert. denied, 489 U.S. 1034, 109 S. Ct. 1095, 1097-98 (1989) (mem.) (O'Connor J. dissenting).

Beyond the use of force context, the Eighth and Eleventh Circuits have extended the *Whitley* analysis to the areas of conditions and compliance with prison rules, respectively. In *Givens v. Jones*, 900 F.2d 1229 (8th Cir. 1990), an inmate claimed that noise and fumes from remodeling were causing him migraine headaches in violation of the Eighth Amendment. The Eighth Circuit, finding no constitutional violation, referred to *Whitley* and stated: "[d]isturbing prison conditions that came about by inadvertence or error in good faith, however, do not constitute constitutional violations, even though the conditions may involve the infliction of

discomfort and pain." *Givens v. Jones*, 900 F.2d at 1234. Moreover, the court proceeded to find: "Givens has not alleged conduct . . . that rose to the level of a constitutional violation. Givens has not claimed that the noise and fumes were the result of *malicious* intent or even reckless disregard for his well being." *Id.* (emphasis added). See also *Holloway v. Lockhart*, 813 F.2d 874, 879 (8th Cir. 1987) (applying *Whitley* "unnecessary and wanton pain and suffering" standard to the use of tear gas to end an occupation of a prison).

In *Ort v. White*, 813 F.2d 318 (11th Cir. 1987) the court considered whether temporary denial of water to an inmate to obtain compliance with work regulations constituted an Eighth Amendment violation. The circuit court affirmed the dismissal of the inmate's complaint and applied the *Whitley* "malicious and sadistic" analysis to this non-riot, non-use of force action.

Thus, where such immediate coercive action is necessary, the conduct of prison officials does not constitute cruel and unusual punishment within the meaning of the eighth amendment if it was undertaken *not maliciously or sadistically*, but in a good faith effort to restore order or prevent a disturbance, and if the force used was reasonable in relation to the threat of harm or disorder apparent at the time.

813 F.2d at 325 (emphasis added).

The Sixth Circuit defined "wanton and obdurate" in a manner that allows courts to look at whether the conditions at issue are "persistent" or ongoing in nature, rather than an isolated act or isolated omission, and whether the behavior amounts to "malicious cruelty." This test is well founded and supported by the need to examine prison officials' knowledge of the alleged deficient conditions, actions taken to cure the conditions, and any barriers to action that affect the officials' ability to cure the alleged deficient conditions.

The Eighth Amendment is not a basis for broad prison

reform. Inmates can not expect the amenities, conveniences and conditions that one might find desirable. "[T]he Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes, cannot be free of discomfort." *Rhodes v. Chapman*, 452 U.S. at 349. The Sixth Circuit's use of "persistent malicious cruelty" in reviewing a prison conditions case strikes the needed balance, protecting inmates' constitutional rights, while allowing prison officials flexibility to deal with the practical difficulties of running our nation's prison systems.

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF THE RESPONDENTS.

Deciding cases on summary judgment conserves judicial resources and fosters prompt resolution of disputes. In light of the heavy congestion of cases in the judicial system,²⁷ summary judgment is an important tool for expeditiously

²⁷ As the Sixth Circuit has noted: "in recent years an increasingly large number of frivolous cases have been filed in federal court — both by lawyers and *pro se*. Many of these suits waste the time of public officials, lawyers, and the courts. Minimum pleading requirements are needed, even for *pro se* plaintiffs, whose lawsuits now comprise more than 1000 or almost 25% of the appeals filed in this Court." *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989). See also States Attorneys' General Brief of *Amicus Curiae*.

Petitioner is a classic example of a recreational litigator, contributing to the congestion of federal courts. Earlier this year, the Sixth Circuit Court of Appeals noted that Petitioner had filed over 70 appeals since 1976 and that almost all of the filings had either been frivolous or premature. *Pearly Wilson v. George Denton, et al.*, Case Nos. 89-3454 and 89-3978 (6th Cir. March 20, 1990) unreported, cert. denied, 110 S. Ct. 2217 (1990), (reproduced in appendix A. 6-10.) In the last two years alone, Petitioner has filed 24 appeals in the Sixth Circuit. *Id.* The Sixth Circuit affirmed a fine under Fed. Rule Civ. P. 11 against Petitioner for abusive conduct and penalized Petitioner by requiring a partial filing fee for all future cases. *Id.* at (A.9). While Petitioner claims that the conditions of confinement created hardships as to "reading, writing and studying," (J.A. 4, Amended Complaint ¶9) his numerous filings would controvert any allegation that conditions at HCF denied Petitioner access to the courts.

resolving those cases in which no genuine issue of material fact exists. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. Rule Civ. P. 1).

Summary judgment preserves the rights of plaintiffs to have their disputes heard and also, in cases such as this one, enables judges to determine without a trial cases in which no genuine issue of material fact exists.

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. at 327.

Preservation of judicial resources is even more important for the prompt resolution of Eighth Amendment claims when *pro se* plaintiffs, who are entitled to liberal construction of their pleadings, make conclusory allegations that they have been subjected to cruel and unusual punishment. Courts must be able to fairly and expeditiously determine cases in which there exists no genuine issue of material fact regarding the constitutionality of conditions in a detention facility. Summary judgment acts to preserve the rights of prisoners asserting claims that are adequately based in fact to have access to the courts, and yet still preserves the rights of prison officials to avoid trial of claims that have no factual basis.

It is, therefore, imperative that the elements required to establish a constitutional violation under the Eighth Amendment include an inquiry into the good faith efforts

made by prison officials to provide the prisoner with habitable conditions. It is unavoidable that prison conditions will be objectionable to prisoners. If a prisoner can defeat a motion for summary judgment merely by making conclusory statements by affidavit that mirror a conclusory complaint, while not stating facts substantiating his claim, summary judgment will never be available in a conditions case.

Use of a deliberate indifference standard for a prison conditions case fails to satisfy the goals of promoting judicial efficiency while protecting the rights of all parties to litigation. It is reasonable to hold a prison official to a deliberate indifference standard when examining official actions that actually cause pain or detriment to bodily integrity, e.g. lack of medical care or failure to protect claims. However, when an Eighth Amendment claim contests continuing conditions of confinement which inherently involve varying degrees of discomfort and which require discretionary decisions by state officials, the standard for review by a federal court should accord more deference to the prison official. A "persistent malicious cruelty" standard accords the appropriate deference to the prison officials' decision making function in conditions cases which challenge actions which do not cause actual pain. Additionally, this standard promotes judicial efficiency while still preserving the judiciary's duty to protect the constitutional rights of the imprisoned.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By definition, every lawsuit involves a dispute. To grant summary judgment, a judge must determine whether the dispute involves a "genuine" issue as to a "material" fact. The Court has established that "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To create a "genuine" issue of fact, the evidence must be more than "merely colorable." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 252.

To be entitled to summary judgment, Respondent need not negate Petitioner's unsubstantiated claims and immaterial facts. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Just as a court may sua sponte grant summary judgment if claims are factually unsupported, so may summary judgment be granted without Respondent specifically rebutting each immaterial fact and unsupported claim Petitioner sets forth. *Id.* at 326. Respondent need only "point [] out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Here, the boundary of material facts is drawn by the Eighth Amendment to the United States Constitution and the relevant case law. To establish an Eighth Amendment claim of cruel and unusual punishment, a prisoner must allege and prove the following material facts: (1) that the challenged action is punishment, *Bell v. Wolfish*, 441 U.S. 520, *see supra* pp. 9-12, (2) that the punishment seriously deprives the inmate of basic human needs, *Rhodes v. Chapman*, 452 U.S. at 347, *see supra* pp. 13-23, and (3) that the prison officials acted with a wanton and obdurate state of mind. *Whitley v. Albers*, 475 U.S. 312, *see supra* pp. 24-36.

Petitioner presented no facts from which a reasonable jury could infer that the complained of conditions constitute "punishment" prohibited by the Eighth Amendment. All of the complained of conditions are rationally related to legitimate security, administrative and fiscal concerns, or are the inevitable result of the climate conditions affecting all Ohio residents.

Assuming, *arguendo*, that Petitioner had presented evidence to create a genuine issue as to whether the conditions complained of constituted punishment, Petitioner was also required to produce sufficient evidence for a reasonable jury to conclude that the conditions constituted cruel and unusual punishment. To create a genuine issue of fact, Petitioner was required to produce evidence that Respondents failed to provide Petitioner with the "minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. at 347. Petitioner's personal sensibilities do not define the threshold level at which an unpleasant condition becomes a constitutional violation. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes v. Chapman*, 452 U.S. at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). An Eighth Amendment violation involves more than harsh conditions. *Rhodes v. Chapman*, 452 U.S. at 347-48; *supra* pp 13-14, 24. Petitioner's affidavits contain few allegations of objective facts which support his claim of unconstitutional conditions. The affidavits are replete with conclusory statements such as "inadequate heat," "ventilation is totally inadequate," "extermination is totally inadequate." (J.A. 32-35). These conclusory allegations do not create a genuine issue of fact. The question of genuineness requires Petitioner to show something more than a "metaphysical doubt" about a material fact. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Petitioner failed to make such a showing here.

Petitioner claims that there are factual disputes as to whether the conditions at HCF provide Petitioner with the minimal civilized measure of life's necessities, precluding summary judgment. Brief of Petitioner at 30-33. Petitioner argues that "[t]he allegations of the petitioner's affidavits, taken together, put in issue whether petitioner has been deprived of the 'minimal civilized measure of life's necessities' with regard to food, sanitation, and shelter under *Rhodes*." *Id.* at 30. By arguing that the conditions were "put in issue," Petitioner seems to be applying a standard applicable to a motion to dismiss, not a motion for summary judgment. To survive a motion for summary judgment, Petitioner must

do more than "put in issue" the conditions; he must show sufficient facts to allow a jury to conclude there was a constitutional violation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-57.

Petitioner argues that it was error for the lower court to dispose of Petitioner's claims of overcrowding, housing with mentally ill inmates, and inadequate cooling on summary judgment because the conditions constitute Eighth Amendment violations when "taken as a whole" or considered under the "totality of the conditions." Brief of Petitioner at 36-39. Petitioner attempts to argue that even if each condition is constitutional when considered alone, they become unconstitutional when taken as a whole. This synergistic argument, that the whole is somehow unconstitutional while the component conditions are not, is inconsistent with the implications of *Rhodes v. Chapman*, *see supra* pp. 21-22, and is not a genuine issue that can preclude summary judgment. To defend against a motion for summary judgment Petitioner was required to produce sufficient evidence on each of the allegedly unconstitutional conditions to permit a reasonable jury to find that the condition denied Petitioner of the minimal civilized measure of life's necessities. The court of appeals properly found that Petitioner failed to meet this burden on three claims, overcrowding, inadequate cooling, and housing with mentally ill inmates. *Wilson v. Seiter*, 893 F.2d at 865 (J.A. 68-70).

Whether prison officials acted with "obduracy and wantonness" rather than through "inadvertance" or "an error in good faith" is also a material fact which a prisoner must establish to prevail on a claim of cruel and unusual punishment in violation of the Eighth Amendment. *Whitley v. Albers*, 475 U.S. at 319. In response to Respondents' motion for summary judgment, Petitioner was required to produce evidence to raise a genuine issue as to whether Respondents acted obdurately and wantonly. The court of appeals properly applied this analysis. "Having concluded that a showing of obduracy and wantonness is material to appellants' claims, the critical, and determinative, question becomes whether

appellants' affidavits place this fact in issue." *Wilson v. Seiter*, 893 F.2d at 866 (J.A. 70).

The only evidence which Petitioner claims supports his position that Respondents acted obdurately and wantonly are the allegations in Petitioner's affidavit that approximately forty-five days prior to filing his complaint, he sent a letter to Respondents complaining about the conditions of his confinement.²⁸ The letter recites Petitioner's dissatisfaction with dormitory life at HCF. He complained about "the smoking and body odors of other inmates" (A. 15) and that "the beds at HCF are far too close" (A. 15). Petitioner objected to the institution of the unit management system, which Petitioner claimed "is non-workable." (A. 12-13). Petitioner claims "there is no heating system in 'C' Dormitory." (A. 15). Petitioner alleged he was housed among inmates he claimed were physically and mentally ill, but the letter cites no specific injuries Petitioner or anyone else suffered as a result. The letter contains no complaints whatsoever about unsanitary eating conditions, unclean restrooms, insect infestation, excessive noise or inadequate cooling, allegations which Petitioner subsequently asserted in his lawsuit.

Petitioner alleges that Respondent Seiter did not reply to his letter, but admits Respondent Humphreys responded in writing and referred a copy of the letter to Mr. Friend, the unit manager.²⁹ (J.A. 32-33, Wilson Affidavit ¶ 3a, 3b). Petitioner claims that the letter is evidence of Respondents'

²⁸ A copy of the letter referred to in Petitioner's affidavit as Exhibit 1, along with Exhibits 2 and 3 were not attached to the affidavit as it appears in the Joint Appendix. (J.A. 32-33, Wilson Affidavit ¶ 3, 3a and 3b). All three exhibits are reproduced in the Appendix to the Brief for Respondents. (A. 11-19).

²⁹ The unit management system used at HCF is "designed to help solve inmate problems and deal with inmate complaints at an individual instead of an institutional level". (J.A. 50). Under this system, each dorm is staffed with three professionals including a social worker and prison official. A member of the team is available twelve hours a day, seven days a week to resolve inmate concerns. (J.A. 50-51).

state of mind because, Petitioner alleges, no action was taken to change the conditions to Petitioner's satisfaction. Brief of Petitioner at 32. This bare allegation that Respondents were informed of some of Petitioner's complaints and that the complaints were not resolved to Petitioner's satisfaction simply does not create a genuine issue of fact as to whether Respondents acted "obdurately and wantonly."

No reasonable jury could find that referring inmate complaints to the unit manager, the individual responsible for dealing with inmate complaints, was evidence of "obdurate and wanton" behavior. In addition, Respondents' affidavits set forth specific good faith efforts that had been previously taken by prison officials in regard to the complained of conditions. Homer Friend, the unit manager, stated in his affidavit that rules are in effect to keep down the noise level, the heaters were recently serviced and are in good working order, the restrooms are completely cleaned twice a day and spot cleaned as needed, and an exterminator is brought into the institution twice each month. (J.A. 40-42).

Petitioner did not submit evidence to contradict any of these specific statements of fact. This uncontroverted evidence of the prison officials' good faith efforts to provide the minimal civilized measure of life's necessities precludes a finding that Respondents' behavior was wanton and obdurate. Summary judgment is appropriately rendered against a party who, like Petitioner, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. at 322. As the court of appeals found: "appellants' affidavits, in that they fail to raise a reasonable inference of obduracy and wantonness on the appellees' behalf, present no genuine issue as to that material fact." *Wilson v. Seiter*, 893 F.2d at 867 (J.A. 74).

Although evidence of wanton and obdurate conduct necessarily requires evidence of the state of mind of Respondents, merely asserting a claim for which state of

mind is a material element does not preclude summary judgment. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255-56, the Court held that summary judgment was properly granted in a libel action brought by a public figure where the plaintiff failed to present evidence that the defendants acted with actual malice. The Court specifically rejected the contention that summary judgment should seldom, if ever, be granted if the defendant's state of mind is at issue.

Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 257.

Other circuits have held that summary judgment motions were properly granted in cases brought by prisoners where the allegations of unconstitutional conditions of confinement were not supported by evidence of wanton and obdurate conduct by prison officials. In *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988), the Seventh Circuit affirmed the trial court's grant of summary judgment, stating: "The defendants' temporary neglect of Harris's needs was not intentional, nor did it reach unconstitutional proportions." The Fourth Circuit, in *Ruelly v. Landon*, 825 F.2d 792, 793 (4th Cir. 1987), affirmed a grant of summary judgment because the plaintiff inmate failed to show "that the defendants wantonly and obdurately failed to take precautions for his safety." Similarly, the Tenth Circuit affirmed the dismissal of an inmate's claim of cruel and unusual punishment: "Plaintiff has not shown more than inadvertence or a good faith error by defendants. . . . Plaintiff has not shown that any defendant acted in a wanton or obdurate manner." *Blankenship v. Meachum*, 840 F.2d 741, 742-43 (10th Cir. 1988). See also *Johnson v. Pelker*, 891 F.2d 136, 138 (7th Cir. 1989) (defendant's "indifference" insufficient to state a claim of cruel and unusual punishment).

It is well settled that a "pro se document is to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Even allowing a liberal construction of Petitioner's evidence,³⁰ however, Petitioner's conclusory allegations were insufficient to defeat Respondents' motion for summary judgment. As this Court recently stated in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3188 (1990):

In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict [material] facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. . . . The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.

Petitioner's affidavits failed to raise a genuine issue of fact as to whether the complained of conditions constitute punishment, whether the conditions deprive him of the minimal civilized measure of life's necessities, or whether Respondents acted "obdurately and wantonly." The failure to raise a genuine issue of fact as to any one of these three elements is fatal to Petitioner's case. As Petitioner failed to raise a genuine issue of material fact as to all of the three elements, summary judgment was properly granted.

³⁰ While courts give liberal construction to the pleadings of pro se litigants, a pro se party must still set forth facts sufficient to withstand summary judgment. *Vigliotto v. Terry*, 873 F.2d 1201, 1203 (9th Cir. 1989) ("No valid interest is served by withholding summary judgment on a complaint that wraps nonactionable conduct in a jacket woven of legal conclusions and hyperbole.")

CONCLUSION

For all of the aforementioned reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

RITA S. EPPLER
Chief, Federal Litigation Section
Counsel of Record

NANCY J. MILLER
Deputy Chief Counsel

STEVEN W. RITZ
CHERRY LYNNE POTEET
NANCY JOHNSTON
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43266-0410
(614) 466-5414

COUNSEL FOR RESPONDENTS

DECEMBER 19, 1990

APPENDIX TO BRIEF FOR RESPONDENTS

**THE CONSTITUTION OF
THE UNITED STATES OF AMERICA**

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * *

OHIO REVISED CODE § 9.86**Civil immunity of officers and employees; exceptions.**

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

* * *

RULES OF THE SUPREME COURT OF THE UNITED STATES

PART III - JURISDICTION ON WRIT OF CERTIORARI

Rule 14

CONTENT OF THE PETITION FOR A WRIT OF CERTIORARI

.1. The petition for a writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on that page. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

RULE 1. SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

[Amended effective October 20, 1949; July 1, 1966.]

* * *

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[Amended effective August 1, 1983; August 1, 1987.]

* * *

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended effective March 19, 1948; July 1, 1963; August 1, 1987.]

* * *

Nos. 89-3454, 89-3978

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PEARLY L. WILSON,)	
	)	On Appeal
Plaintiff-Appellant,	)	from the United
	)	States District
v.	)	Court for the
	)	Southern
GEORGE F. DENTON, ET AL.,	)	District of Ohio
)	
Defendants-Appellees.)	

Decided and Filed March 20, 1990

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations.
Please see Rule 24 before citing in a proceeding in a court
in the Sixth Circuit. If cited, a copy must be served on other
parties and the Court. This notice is to be prominently
displayed if this decision is reproduced.

Before GUY and BOGGS, Circuit Judges, and GADOLA,
District Judge.*

Pearly Wilson is a pro se Ohio prisoner who appeals the
district court's denial of a motion for relief from judgment
that he filed under Fed. R. Civ. P. 60(b). Wilson also appeals
the district court's assessment of sanctions against him under

* Honorable Paul V. Gadola, United States District Judge for the Eastern
District of Michigan, sitting by designation.

Fed. R. Civ. P. 11. These appeals have been consolidated
and Wilson's case has been referred to a panel of the court
pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon
examination of the record and the briefs, the panel
unanimously agrees that oral argument is not needed in this
case. Fed. R. App. P. 34(a).

In 1976, Wilson initiated a prison conditions suit under
42 U.S.C. § 1983. In 1979, the district court entered a consent
decree that resolved all of the issues in the case except
one. Wilson's claim that he was entitled to damages because
he had not received proper medical care for an injury to
his hand was severed from the rest of the case. On August
6, 1985, the district court granted the defendants' motion
for summary judgment on this issue. This court affirmed that
judgment on October 31, 1986, and the United States
Supreme Court denied Wilson's petition for certiorari on
February 23, 1987.

Wilson then filed a motion to alter or amend the judgment
under Fed. R. Civ. P. 60(b)(6). On March 31, 1988, the district
court entered an order that denied Wilson's motion. At that
time, the court also denied the defendants' motion for Rule
11 sanctions. This court affirmed the district court's order
on October 19, 1988 and denied Wilson's motion for
reconsideration on December 9, 1988. The Supreme Court
denied certiorari on February 21, 1989.

Wilson then filed his second motion under Rule 60(b). The
defendants again moved for sanctions and, on May 17, 1989,
the district court entered an order that denied Wilson's motion
and granted the defendants' motion for sanctions under Rule
11. The court subsequently ordered Wilson to pay the
defendants \$200.00 for their attorney's fees. It is from these
orders that Wilson now appeals.

The district court properly denied Wilson's most recent
motion under Rule 60(b)(3) and (b)(6). First, Wilson's allegation
of fraud under section (b)(3) was not made within one year
of the date of judgment as required by the rule. See *Wood*
v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981), *cert. denied*,

455 U.S. 942 (1982). Moreover, there is nothing in the record to suggest that there was a fraud upon the court. Wilson's argument that he did not authorize the settlement of his damage claims misapprehends the procedural history of his case. These claims were severed by the district court more than a year before the entry of the consent decree pursuant to an amicus curiae motion that was filed by the U.S. Department of Justice. The agreed order that was signed by counsel after the consent decree preserved Wilson's right to proceed with his case and restricted the defendants' ability to object to Wilson's evidence on the ground that it related to the issues that had been adjudicated by the decree. The entry of this order evidences careful lawyering on Wilson's behalf rather than fraud.

Nevertheless, the district court granted the defendants' motion for summary judgment because it found that the uncontroverted facts simply did not support Wilson's claim for damages. That decision has been extensively reviewed by the district court and by this court as well. The Supreme Court has twice declined further review of this claim. Under these circumstances, it cannot be said that the district court abused its discretion in denying Wilson's second motion under Rule 60(b).

Moreover, it was appropriate for the district court to assess sanctions of \$200.00 in this case under Fed. R. Civ. P. 11. In reviewing the imposition of Rule 11 sanctions, this court looks "to see whether the district court judge abused his discretion in finding plaintiff's conduct to have been unreasonable under the circumstances." *LeMaster v. United States*, 891 F.2d 115, 118 (6th Cir. 1989). It was not an abuse of discretion for the district court to impose sanctions against Wilson for attempting to relitigate his claim for damages when that issue had repeatedly been decided against him. *Cf. Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988); *Hewitt v. Sperl*, 798 F.2d 1230, 1233 (9th Cir. 1986). In addition, the record belies Wilson's argument that sanctions were imposed because the judge was biased. Indeed, the district court denied the defendants' first motion under Rule 11 even though sanctions might already have been appropriate at

that time.

In dismissing an unrelated case, a different judge was compelled to observe that "Wilson's habitual filing in forma pauperis in federal court constitutes an abuse of process." *Wilson v. American Tobacco Co.*, Nos. C2-87-1069/C2-87-1075/C2-87-1219 (S.D. Ohio, Sept. 20, 1989). Our own records indicate that Wilson has filed over 70 cases with this court since 1976. At least 24 of those cases have been filed in the last two years. Almost all of these filings have been either frivolous or premature.

Requiring Wilson to pay a partial filing fee may discourage frivolous litigation in the future. Several other circuits have considered this issue and have decided that the payment of partial fees was appropriate under similar circumstances. See *In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989) (citing *In re Williamson*, 786 F.2d 1336, 1339-41 (8th Cir. 1986); *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983); *Bullock v. Suomela*, 710 F.2d 102, 103 (3rd Cir. 1983); *Smith v. Martinez*, 706 F.2d 572, 574 (5th Cir. 1983); *Evans v. Croom*, 650 F.2d 521, 522-23 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982); *cf. Zaun v. Dobbin*, 628 F.2d 990, 993 (7th Cir. 1980) (non-prisoner, pro se litigants)). In addition, separate panels of our own court have recently issued unpublished orders which required partial filing fees from at least two other abusive litigants. *Bond v. Hood*, No. 89-5841 (6th Cir. Nov. 21, 1989); *May v. Warner Amex Cable Communications*, Nos. 88-3802/88-4029 (6th Cir. Feb. 28, 1989).

Wilson's most recent in forma pauperis applications indicate that the balance of his prison account fluctuates between fifty cents and five dollars. Therefore a \$3.00 filing fee would encourage Wilson to be appropriately selective in his future litigation without creating a de facto bar to his access to the court. Wilson is also advised that his ability to proceed in forma pauperis may be further restricted if he continues to file frivolous cases in this court. See *Maxberry v. S.E.C.*, 879 F.2d 222, 224 (6th Cir. 1989).

Accordingly, Wilson's request for counsel is hereby denied

and the district court's order is affirmed because the allegations in Wilson's second motion for post judgment relief are untimely, repetitious and substantively without merit. The district court's imposition of Rule 11 sanctions was reasonable and is affirmed for these same reasons. Rule 9(b)(5), Rules of the Sixth Circuit. In addition, the Clerk is directed to require a partial filing fee of \$3.00 from Wilson in each appeal or original action that he files in this court in the future.

* * *

EXHIBIT 1: Wilson Affidavit (J.A. 32)

Pearly L. Wilson, #146-097
Hocking Correctional Facility
Post Office Box 59
Nelsonville, Ohio 45764

July 8, 1986

Mr. Richard P. Seiter, Director, Department of
Rehabilitation and Corrections - 1050 Freeway Drive,
North - Columbus, Ohio 43229;

-and-

Mr. Superintendent Carl Humphreys
Hocking Correctional Facility
17659 Snake Hollow Road
Post Office Box 59
Nelsonville, Ohio 45764

Dear Mrs Seiter and Humphreys:

I am bringing to your personal attentions the following conditions of confinement to which you are subjecting me and requesting that same be corrected at once.

- 1st: You have me warehoused at the Hocking Correctional Facility at Nelsonville, Ohio with both severe mentally and physically ill inmates, and close proximity which subjects me to cruel and unusual punishment.
- 2nd: The number of medical staff members, both in the medical and psychiatric department, as well as the psychological department, are not adequately staffed to ensure the care and attention for these ill men above mentioned.

3rd: These dormitories at this Facility, (hereinafter designated as "HCF"), are overcrowded and completely unsanitary and does not further the prison's goals or policies legitimately.

(a) nor does the overcrowding meet the standards of correctional association and public health association's requirements and is an immediate and sure danger to the health of every inmate at HCF. Being warehoused like this is definitely not a part of the penalty imposed upon me by the courts of the State of Ohio. Gentlemen, the close proximity, such as it is here, can and will lead to increased incidences of contagious diseases and a severe breakdown of the immune system of not only myself, but every man at this Facility. The negative effects of open dormitory living has caused mental stress far too severe to measure to any reasonable degree and can only be corrected to satisfaction by a reduction of the present population at HCF.

(b) You have warehoused here, inmates who have been operated on at various hospitals; returned to HCF; and lie here with open sores. These men have been discharged from the Infirmary at HCF far too soon because of the small area and lack of space in which to care for these mens' (sic) medical needs in and at the Infirmary. I refer to inmates who wear the bags for urinating and defacating since it is impossible for them to do so in a normal fashion after their operations. And, it must be brought to your personal attentions that these men cleanse these bags, etc., in the sinks and toilets in the dormitories. This should not be permitted. There should be a special place for that particular purpose. Most of these men know nothing about personal hygiene, nor do they care.

4th: You now have what id (sic) cased or called a "Unit Management" thing; based upon the federal "Unit Management" which failed in the federal system. It

is beyond my comprehension as to why this was instituted at HCF. However, the so-called "Unit Management" at HCF is non-workable. And it is my duty to advise you that:

(a): you have personnel operating the so-called Unit Management who are totally unqualified to do so; having no prior training in that department or area;

(b): these personnel have access to prisoners' criminal and medical records; lacking training in either department or area; and, to top that off, it has been brought to our attentions that these untrained personnel will make recommendations to the Adult Parole Authority regarding our chances for paroles, etc.

(c): Such as listed above is brutal misclassifications of inmates by untrained personnel. Many prisoners at HCF suffer from ranges of mild to severe mental impairments, yet, openly confined with the general population. Many prisoners suffer from a broad range of mental problems; some psychotic, others are victims of early brain damage/injury, and all are incapable of functioning in a normal prison environment. Same of which inflicts cruel and unusual punishment in contravention of my rights under the Eighth Amendment.

(d): Be advised that not a single guard, not a single medical nurse, nor any of your personnel at HCF is trained in dealing with these men who have these mental problems and it results in unnecessary and wanton infliction of pain upon not only myself, but all the other normal inmates at HCF.

(e): the very placing of well-intentioned guards in the position of dealing with inmates who are mentally ill without training or adequate guidance, results in the infliction of cruel and unusual punishment upon all inmates at HCF.

Be further advised that the Supreme Court of the United States has set forth the goals of penal confinement by the states in our criminal justice system: "To punish justly, to deter future crime, and to return imprisoned persons to society with an improved change (sic) of being useful, law abiding citizens. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 2402 (1981). These men should be in the least restrictive environments. But you really have us warehoused without proper classifications, etc.

It has always been my contention, gentlemen, that the transfer of myself from the Chillicothe Correctional Institute at Chillicothe, Ohio, was for the sole purpose of punishment of myself because of the various lawsuits filed in courts against State of Ohio prison officials, and I must advise you that this is, and has always been true. Not speculated.

Be advised that I do not intend to permit passive negligence be the claim by either of you gentlemen if these subjections are not corrected forthwith. I cannot allow my mentality to do what is plainly intended: digress by degrees, at your hands because you do not care as to how we are confined at this Facility. . . . or with whom.

5th: Because of the alleged sex offense crime which I have been convicted of, you do not any longer permit sex offenders to be furloughed; although you have already furloughed several sex offenders from HCF. This is a blatant denial of equal protection of the laws, gentlemen. And I have been confined well more than ten (10) years and there is not a single incidence of a sex violation on my record at any facility wherein I have been confined. My institution record speaks for me.

6th: At HCF there is completely inadequate ventilation even though every one of the windows are open. This is a dead area where HCF is situated. No air or oxygen comes through these windows sufficient to be healthy. . . . whatwith the close proximity of these diseased prisoners here who have lung problems and hardly any hygienic training.

(a): The smoking and body odors of other inmates is horrible, to say the least.

7th: In winter, there is no heating system in "C" Dormitory. This has been like so since this Facility has been opened in 1983. I will also bring to your attention that there is insufficient clothing given these men for winter since there is no heating system in the dormitory listed. Such is an infliction of cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

8th: The beds at HCF are far too close for a healthy environment; being that so many of these inmates are with lung diseases and other physical impairments which could be communicated to another prisoner against his will and without his knowledge.

I shall await your response to these conditions listed by me above and certainly request, again, that every listed violation be corrected forthwith. In the event that no changes are made within a reasonable time, be advised that I shall be forced to file a lawsuit against you and all prison personnel involved in these unhealthy conditions and cruel and unusual punishment imposed upon me without cause or justification.

Sincerely,

/s/ Pearly L. Wilson

PEARLY L. WILSON

EXHIBIT 2: Wilson Affidavit (J.A. 32-33)

* SENDER: Complete items 1, 2, 3 and 4.

Put your address in the "RETURN TO" space on the reversable side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☐ Show to whom, date and address of delivery.
2. ☐ Restricted Delivery.

3. Article Addressed to:

Richard P. Seiter, Director
Dept. Rehabilitation & Corrections
1050 Freeway Drive, North
Columbus, Ohio 43229

4. Type of Service Article Number

- ☐ Registered ☐ Insured /s/ P 678 311 646
☐ Certified ☐ COD
☐ Express Mail

Always obtain signature of addressee or agent and
DATE DELIVERED.

5. Signature - Addressee

X _____

6. Signature - Agent

X /s/ R. Campbell _____

7. Date of Delivery

_____ /s/ 7/14/86 _____

8. Addressee's Address (ONLY if requested and fee paid)

PS FORM 3811, July 1983 447-845
Domestic Return Receipt

* * *

EXHIBIT 3: Wilson Affidavit (J.A. 33)

* SENDER: Complete items 1, 2, 3 and 4.

Put your address in the "RETURN TO" space on the reversable side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☐ Show to whom, date and address of delivery.
2. ☐ Restricted Delivery.

3. Article Addressed to:

Supt. Carl Humphreys
Hocking Correctional Facility
P.O. Box 59
Nelsonville, Ohio 45764

4. Type of Service Article Number

- ☐ Registered ☐ Insured /s/ P 678 311 645
☐ Certified ☐ COD
☐ Express Mail

Always obtain signature of addressee or agent and
DATE DELIVERED.

5. Signature - Addressee

X _____

6. Signature - Agent

X /s/ Melissa J. Burch _____

7. Date of Delivery

_____ /s/ 7/11/86 _____

8. Addressee's Address (ONLY if requested and fee paid)

PS FORM 3811, July 1983 447-845
Domestic Return Receipt

* * *

JAN 8 1991

JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PEARLY L. WILSON,
v. *Petitioner,*

RICHARD SEITER, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF PETITIONER

ELIZABETH ALEXANDER *
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1875 Connecticut Ave., N.W., #410
Washington, D.C. 20009
(202) 234-4830

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216) 781-6278

JOHN A. POWELL
STEVEN A. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Counsel for Petitioner

* Counsel of Record

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THIS COURT SHOULD NOT ADOPT A "PERSISTENT MALICIOUS CRUELTY" STANDARD FOR CONTINUING CONDI- TIONS OF CONFINEMENT	2
A. This Court Should Not Create a New, Inter- mediate Eighth Amendment Standard for Conditions Cases	2
B. Conditions of Confinement, Like Depriva- tions of Medical Care and Failures to Pro- tect Prisoners, Can Cause Prisoners Pain, Injury, or Death	4
C. The Standard Respondents Advocate for Conditions of Confinement Is Higher Than the <i>Whitley</i> Standard for Prison Riots.....	6
D. State of Mind Is Irrelevant to Eighth Amendment Analysis of Punishments Im- posed by Official Policy	7
III. STATE OF MIND IS RELEVANT TO EIGHTH AMENDMENT ANALYSIS OF ONE-TIME EVENTS, BUT NOT OF CON- TINUING CONDITIONS	11
IV. THE CONDITIONS OF CONFINEMENT ALLEGED BY PETITIONER CONSTITUTE PUNISHMENT	17
V. THE PETITIONER HAS ALLEGED CONDI- TIONS THAT, IF PROVEN, INVOLVE SERI- OUS DEPRIVATIONS OF BASIC HUMAN NEEDS	17
VI. IN EVALUATING PRISON CONDITIONS UNDER THE EIGHTH AMENDMENT, COURTS MUST CONSIDER THE TOTALITY OF CONDITIONS	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	17, 18
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	17
<i>Bruscino v. Carlson</i> , 854 F.2d 162 (7th Cir. 1988), cert. denied, 109 S.Ct. 3193 (1989)	12
<i>Clemmons v. Bohannon</i> , 918 F.2d 858 (10th Cir. 1990)	4
<i>Corselli v. Coughlin</i> , 842 F.2d 23 (2d Cir. 1988)	10
<i>Cortes-Quinones v. Jimenez-Nettleship</i> , 842 F.2d 556 (1st Cir. 1988), cert. denied, 109 S.Ct. 68 (1988)	9, 10, 11
<i>DeGidio v. Pung</i> , — F.2d —, 1990 WL 191501 (8th Cir.) (12/4/90)	16
<i>DeShaney v. Winnebago County DSS</i> , 109 S.Ct. 998 (1989)	14
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	passim
<i>Evans v. Dugger</i> , 908 F.2d 801 (11th Cir. 1990) ..	4, 9
<i>Gates v. Collier</i> , 501 F.2d 1291 (5th Cir. 1974)	13
<i>Givens v. Jones</i> , 900 F.2d 1229 (8th Cir. 1990)	10
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	8, 9
<i>Harris v. Fleming</i> , 893 F.2d 1232 (7th Cir. 1988) ..	15
<i>Holloway v. Lockhart</i> , 813 F.2d 874 (8th Cir. 1987)	10
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	17, 19, 20
<i>Kelley v. McGinnis</i> , 899 F.2d 612 (7th Cir. 1990)	16
<i>LaFaut v. Smith</i> , 834 F.2d 389 (4th Cir. 1987)	4
<i>Lopez v. Robinson</i> , 914 F.2d 486 (4th Cir. 1990) ..	16
<i>McCarthy v. Bronson</i> , 111 S.Ct. — (12/10/90) (mem.)	11
<i>Miles v. Apex Marine Corp.</i> , 111 S.Ct. 317 (1990)	14
<i>Morgan v. District of Columbia</i> , 824 F.2d 1049 (D.C. Cir. 1987) ..	10, 11
<i>Ort v. White</i> , 813 F.2d 318 (11th Cir. 1987)	10
<i>Osborne v. Ohio</i> , 110 S.Ct. 1691 (1990)	14
<i>Powell v. Lennon</i> , 914 F.2d 1459 (11th Cir. 1990)	4, 9
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	passim

TABLE OF AUTHORITIES—Continued

	Page
<i>Ricketts v. Anderson</i> , 483 U.S. 1 (1987)	14
<i>Rozecki v. Gaughan</i> , 459 F.2d 6 (1st Cir. 1972)	12
<i>State of Louisiana ex rel. Francis v. Resweber</i> , 329 U.S. 459 (1947)	11, 12
<i>Tillery v. Owens</i> , 907 F.2d 418 (3d Cir. 1990)	5, 21
<i>Todaro v. Ward</i> , 565 F.2d 48 (2d Cir. 1977)	5
<i>Toussaint v. McCarthy</i> , 801 F.2d 1080 (9th Cir. 1986)	20
<i>Watson v. City of Memphis, Tenn.</i> , 373 U.S. 526 (1963)	13
<i>Whitley v. Albers</i> , 475 U.S. 312 (1986)	passim
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)	11

CONSTITUTIONAL PROVISIONS

Eighth Amendment	passim
Fourteenth Amendment	12, 17

FEDERAL RULES

S.Ct. Rule 14.1 (a)	7
---------------------------	---

OTHER AUTHORITIES

Granucci, "Nor Cruel and Unusual Punishments Inflicted:" <i>The Original Meaning</i> , 57 Calif. L. Rev. 839 (1969)	7
---	---

REPLY BRIEF OF PETITIONER

I. INTRODUCTION

In this case, the lower court held that petitioner's Eighth Amendment challenge to the conditions of his confinement must fail because he did not demonstrate that the conditions were imposed with "persistent malicious cruelty." In so holding, the lower court purported to apply this Court's decision in *Whitley v. Albers*, 475 U.S. 312 (1986). However, the lower court misapplied *Whitley*, since that case made clear that the "malicious and sadistic" intent standard applies only to the use of force by prison officials in an attempt to maintain or restore order. Because continuing conditions of confinement, unlike the use of force, do not implicate security concerns, require split-second decision-making, or involve the special expertise of prison officials, the rationales underlying the "malicious and sadistic" use of force standard do not apply in the conditions context.

Rather, this Court held in *Rhodes v. Chapman*, 452 U.S. 337 (1981), that courts must apply objective criteria in determining whether conditions of confinement violate the Eighth Amendment. These objective criteria include whether prisoners have been deprived of the basic necessities of life, such as adequate food, clothing, medical care, and shelter. More fundamentally, the Eighth Amendment jurisprudence of this Court demonstrates that when a challenge is mounted to a punishment imposed by policy, custom, or pattern of nonfeasance, the state of mind of the officials imposing the punishment is irrelevant to the existence of a constitutional violation.

In the alternative, if official state of mind is at all relevant in conditions cases, a prisoner need show no more than "deliberate indifference" on the part of prison officials to establish an Eighth Amendment violation. This is the standard applied by this Court to challenges to prison health care in *Estelle v. Gamble*, 429 U.S. 97 (1976), and explicitly reaffirmed in *Whitley*. The diffi-

culty of drawing a principled distinction between health cases and conditions cases demonstrates that the same "deliberate indifference" test should be applied to both.¹

II. THIS COURT SHOULD NOT ADOPT A "PERSISTENT MALICIOUS CRUELTY" STANDARD FOR CONTINUING CONDITIONS OF CONFINEMENT

A. This Court Should Not Create a New, Intermediate Eighth Amendment Standard for Conditions Cases

Respondents concede in their brief that the Eighth Amendment standard for continuing conditions of confinement is not the "malicious and sadistic" test that this Court applied in *Whitley v. Albers*, 475 U.S. 312 (1986), in judging whether the use of force to quell a prison riot violated the Eighth Amendment. See Respondents' Brief at p. 27: "A more reasonable interpretation of the lower court's decision evidences careful adherence to the *Whitley* 'wantonness and obduracy' standard, requiring something less than 'malicious and sadistic'² and more than negligent conduct." Thus, respondents suggest, there are at least three possible Eighth Amendment standards included within the scope of the general "obdurate and wanton" test drawn from *Whitley* and applicable to challenges to the actions of prison staff: the "malicious and sadistic" standard, drawn directly from *Whitley* and applicable to official use of force; the "deliberate indifference" standard, drawn from *Estelle v. Gamble*, 429 U.S. 97 (1976), and applicable to medical

¹ The objective test and the "deliberate indifference" standard will in practice lead to the same result, since the persistence over time of obvious conditions that deprive prisoners of the basic necessities of life demonstrates deliberate indifference on the part of the responsible prison officials.

² This concession is, of course, virtually compelled by the Court's reaffirmation in *Whitley* of the *Estelle v. Gamble*, 429 U.S. 97 (1976), "deliberate indifference" standard for judging prisoners' Eighth Amendment challenges to deprivations of medical care. The reasons the Court gave in *Whitley* for applying a less exacting standard to medical care claims also apply to continuing conditions of confinement claims. See Petitioner's Brief at pp. 12-13.

care; and a third, "modified *Whitley v. Albers* test," applicable to the conditions in this case. See Respondents' Brief at 34. This modified *Whitley* standard, according to respondents, requires malice, but not sadism. See Respondents' Brief at 27, 29.³

This Court should reject the creation of yet another Eighth Amendment standard applicable to prison litigation. This new standard requiring "malice" but not "sadism" is entirely respondents' invention. Respondents provide no convincing rationale for adding further complexities to Eighth Amendment analysis, and there are good reasons not to do so. While there are some limited areas of controversy over the precise scope of the *Whitley* riot standard,⁴ the general distinction between cases involving the use of force and those challenging prison medical care is well-defined. In contrast, the distinction between medical care cases, where respondents concede that *Estelle's* deliberate indifference standard applies, and conditions of confinement cases, where respondents would apply a malice standard, is frequently obscure.

In this case, for example, petitioner alleged that psychotic prisoners and prisoners with open sores were placed in the dormitory. In addition, petitioner claimed that the dining hall was filthy and that the food is prepared by unsupervised, sometimes diseased prisoners. Heat is so excessive and ventilation so inadequate that, petitioner alleged, prisoners sometimes faint. Petitioner's

³ The respondents' claim that the lower court was attempting to bifurcate the "malicious and sadistic" standard is hard to square with the lower court's opinion, which gave no indication that the court believed it was articulating a test different from the *Whitley* riot standard. See, e.g., *Wilson* at App. 71:

[A]t least in this circuit, the *Whitley* standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.

See also *Wilson* at App. 73:

Additionally, the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty.

⁴ See Petitioner's Brief at 13-14, n.10.

Brief at 4-5, n.3. These claims, although fairly characterized as conditions of confinement claims, involve threats of harm to the petitioner's health that are no different in kind from those that may result from deliberate indifference to medical needs. Certainly the concept of attending to prisoners' serious medical needs is not stretched by requiring that prisoners be protected from an unreasonable risk of contracting contagious or food-borne diseases, or that prisoners' health be protected from other unreasonable risks arising from their conditions of confinement. Claims of this type are common in Eighth Amendment jurisprudence, and to require a court to sort petitioner's claims into medical care and other conditions, and to apply different constitutional standards to these ambiguous and overlapping categories, is an invitation to unnecessary litigation and inconsistent results.⁵

B. Conditions of Confinement, Like Deprivations of Medical Care and Failures to Protect Prisoners, Can Cause Prisoners Pain, Injury, or Death

The respondents' justification for the proposed distinction between medical or failure to protect claims and other conditions of confinement claims is that the former

⁵ For example, a number of the lower court cases cited by the parties involve issues that could fairly be characterized as either medical care or conditions. See *LaFaut v. Smith*, 834 F.2d 389, 391-392 (4th Cir. 1987) (holding that a handicapped prisoner's challenge to a deprivation of special toilet facilities could be characterized as either a medical care or conditions of confinement case); *Evans v. Dugger*, 908 F.2d 801, 804 (11th Cir. 1990) (applying "deliberate indifference to serious medical needs" standard to case with facts similar to those in *LaFaut*); and *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990) (characterizing the requirement to be housed in an area not contaminated with asbestos as a "serious medical need"). See also *Clemmons v. Bohannon*, 918 F.2d 858, — n.7 (10th Cir. 1990) (court of appeals reverses summary judgment for prison officials on prisoner's claim that exposure to second-hand cigarette smoke violates Eighth Amendment, applying "deliberate indifference" test and stating that "the Constitution does not require waiting until the prisoner actually develops a serious medical condition—be it lung cancer or another disease—before affording relief from exposure to a known carcinogen").

involve "a physical injury with concomitant pain." Respondents' Brief at 29. Injunctive relief, however, whether involving a failure to protect, a deprivation of medical care, or other conditions of confinement, seeks to prevent the continued deprivation of the minimal civilized measure of life's necessities. See *Rhodes v. Chapman*, 452 U.S. 337 (1981). Unhealthy or dangerous conditions of confinement—such as lack of fire safety, contaminated food, or structurally unsound buildings—are as capable of causing "physical injury with concomitant pain" as are deprivations of medical care and failure to protect from assault.⁶ The difference between a physical injury or illness that has already occurred and one that the litigant seeks to prevent goes only to the form of the appropriate remedy and not to the standard applied in determining the existence of a constitutional violation. Indeed, the purpose of injunctive relief is to prevent irreparable harm, including physical injury. A court need not wait until the potential harm is realized to address such conditions. See, e.g., *Tillery v. Owens*, 907 F.2d 418, 428 (3d Cir. 1990):

We find nothing in the Supreme Court's relevant jurisprudence that suggests that conditions as deplorable as those at SCIP may not be held to fall below constitutional standards merely because there has not yet been an epidemic of typhoid fever, an outbreak of AIDS, a deadly fire, or a prison riot.

The standard for general conditions of confinement is the same standard used to evaluate systemic challenges to prison medical care. See, e.g., *Todaro v. Ward*, 565 F.2d 48, 51 (2d Cir. 1977) (where systemic medical care deficiencies subjected prisoners to grave and unnecessary

⁶ Respondents assert that "[t]he state of mind requirement is an essential component of any meaningful test for conditions that *do not involve* a threat to bodily integrity, pain, injury, or loss of life." Respondents' Brief at 16. (Emphasis added). Conditions of confinement, for the reasons argued in text, can cause a range of harm that includes the threats listed by respondents, so respondents' position concedes petitioner's point.

risks, the trial court need not wait until an epileptic choked to death on her tongue to grant injunctive relief).

C. The Standard Respondents Advocate for Conditions of Confinement Is Higher Than the *Whitley* Standard for Prison Riots

As noted above, the respondents' contention that the lower court appropriately applied a third standard for continuing conditions of confinement concedes that the *Whitley* riot standard should not be applied to such conditions. This concession by respondents, however, is inconsistent with the fact that the new standard they advocate is in one significant respect even higher than the prison riot standard articulated in *Whitley*.

The respondents defend the lower court's reference to *persistent* malicious cruelty. See Respondents' Brief at 30: "First, the condition had to be 'persistent', reasonably meaning something more than an isolated act or omission. It is reasonable to require more than an isolated act or omission to impose liability in a conditions case." (Footnote omitted). This is a higher standard even than the *Whitley* riot standard, since under this test no single act, regardless of intent or resulting harm, could violate the Eighth Amendment. Thus, prison officials who intentionally served prisoners contaminated food on a single occasion could not be held liable regardless of the resulting illness, pain, or even fatality, while officials who used force "maliciously and sadistically" to quell a riot could be held liable. Such a result would be illogical. The heightened standard of *Whitley* was crafted to shield prison officials from second-guessing when they had to balance compelling penological justifications against prisoners' safety. By contrast, there is *no* penological justification for denying heat, depriving prisoners of ventilation, serving contaminated food, or tolerating insect infestation or the other conditions alleged by the present petitioner.⁷ Thus there is no jurisprudential rationale for

⁷ See n.15, *infra*.

imposing a more demanding standard on such conditions claims than this Court imposed in the context of prison disturbances.

D. State of Mind Is Irrelevant to Eighth Amendment Analysis of Punishments Imposed by Official Policy

Petitioner also notes that respondents defend this new third standard in part based on a contention that the Eighth Amendment cannot be violated unless the defendants act with a culpable state of mind. See Section I.A.3 of Respondents' Brief. This assertion does not respond to petitioner's demonstration that punishments imposed as part of an official policy have never been analyzed in terms of the officials' state of mind. See Petitioner's Brief at 24-25.⁸ Moreover, the respondents' argument ignores the history of the Eighth Amendment. In fact, the use of the word "cruel" in the Eighth Amendment does not imply a state of mind analysis. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 Calif. L. Rev. 839, 860 (1969):

In the seventeenth century, the word "cruel" had a less onerous meaning than it has today. In normal usage it simply meant severe or hard. The Oxford English Dictionary quotes as representative Jonathan Swift, who wrote in 1710, "I have got a cruel cold, and staid within all this day." Sir William Black-

⁸ In respondents' brief at p.15, n.14, they contend that petitioner did not include among the questions presented for review the argument that no separate state of mind analysis is necessary in continuing conditions of confinement cases under the Eighth Amendment. However, the first question presented in the petition is "[w]hether the Sixth Circuit erred in failing to follow the holdings of the Fourth, Fifth, and District of Columbia Circuits that the malicious and sadistic intent requirements of *Whitley v. Albers*, 475 U.S. 312 (1986) do not apply to Eighth Amendment challenges to continuing conditions of confinement that do not involve the use of force." Arguing that the "malicious and sadistic intent" standard from *Whitley* does not apply to continuing conditions of confinement fairly includes a contention that no state of mind requirement applies. See S.Ct. Rule 14.1(a): "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein."

stone, discussing the problem of "punishments of unreasonable severity," uses the word "cruel" as a synonym for severe or excessive.

(Footnotes omitted). Indeed, as noted by the United States (see Brief for the United States as Amicus Curiae, p. 16, n.12), in *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), when this Court first referred to the "unnecessary and wanton infliction of pain," the Court was considering whether the punishment was excessive, not the state of mind with which the punishment was imposed.⁹

⁹ In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court authoritatively rejected the argument (see Respondents' Brief at 8) that the Eighth Amendment is relevant only to claims of torture and sadistic punishment:

But the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth." Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

In *Weems [v. United States]*, 217 U.S. 349 (1910) the Court addressed the constitutionality of the Philippine punishment of *cadena temporal* for the crime of falsifying an official document. That punishment included imprisonment for at least 12 years and one day, in chains, at hard and painful labor; the loss of many basic civil rights; and subjection to lifetime surveillance. Although the Court acknowledged the possibility that "the cruelty of pain" may be present in the challenged punishment, 217 U.S., at 366, 30 S.Ct., at 549, it did not rely on that factor, for it rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, torture and the like." *Id.*, at 368, 30 S.Ct., at 549. Rather the Court focused on the lack of proportion between the crime and the offense.

* * *

It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving stan-

Accordingly, petitioner urges that this Court refuse to apply either the *Whitley* "malicious and sadistic" test or the lower court's "persistent malicious cruelty" standard to continuing conditions. Petitioner has pointed out that the court below is alone in applying the *Whitley* "malicious and sadistic" intent standard to cases involving conditions of confinement. Petitioner's Brief at 15-20, nn. 13-20. Respondents' only answer is that the cases cited by petitioner are "not conditions cases." Respondents' Brief at 33-34, nn. 25, 26.

Respondents do not define "conditions cases" or explain why a case in which the issue is the conditions under which prisoners are confined is not a "conditions case." See, e.g., *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990) (exposure to asbestos); *Evans v. Dugger*, 908 F.2d 801, 802-803 (11th Cir. 1990) (disabled prisoner's lack of access to toilets, showers, dining area, laundry, and law library); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 559-560 (1st Cir. 1988), *cert. denied*, 109

dards of decency that mark the progress of a maturing society." Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment . . . [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also makes clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.

Id. at 171-173. (Citations omitted).

S.Ct. 68 (1988) (severe overcrowding; failure to segregate mentally ill prisoners; gang warfare); *Morgan v. District of Columbia*, 824 F.2d 1049, 1052 (D.C. Cir. 1987) (severe overcrowding).

Respondents' point seems to be that some of these cases involve a prisoner's allegation that officials failed to protect him from assault by other prisoners. This point is nonresponsive to petitioner's argument. Although the plaintiffs in both *Morgan* and *Cortes-Quinones* sought damages for violent injuries, the gravamen of their complaints was continuing conditions of confinement, of which the assaults and resulting injuries were the predictable consequences. These cases' application of a deliberate indifference standard therefore supports petitioner's position directly. See especially *Morgan*, 824 F.2d at 1057-58 (citing continuing nature of jail crowding in rejecting *Whitley* standard). Respondents have no more support for the application of a "malicious and sadistic" standard to continuing conditions of confinement than for the "persistent malicious cruelty" standard.¹⁰

¹⁰ Three of the cases cited by respondents involve use of force by prison officials to maintain or restore order, and are thus clearly distinguishable from cases where continuing conditions of confinement are at issue. See *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1983) (correctional officer's use of force against individual prisoner; summary judgment against prisoner reversed); *Holloway v. Lockhart*, 813 F.2d 874, 879 (8th Cir. 1987) (officers' use of tear gas to end occupation of a dayroom by prisoners; summary judgment against prisoner reversed); *Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) (officer's temporary denial of drinking water to prisoner who refuses to work; court characterizes officer's actions as "necessary coercive measures undertaken to obtain compliance with a reasonable prison rule . . ."). *Givens v. Jones*, 900 F.2d 1229 (8th Cir. 1990), cited by respondents, supports petitioner's contention that the "malicious and sadistic" test is not properly applied in cases challenging conditions of confinement. In that case, the court of appeals applied the "deliberate indifference" test in rejecting a prisoner's claim that his Eighth Amendment rights were violated when he was subjected to noise and fumes from remodeling in the prison, causing him migraine headaches. *Id.* at 1234.

III. STATE OF MIND IS RELEVANT TO EIGHTH AMENDMENT ANALYSIS OF ONE-TIME EVENTS, BUT NOT OF CONTINUING CONDITIONS

There is a distinction between one-time events, such as suppression of the riot at issue in *Whitley*, and continuing conditions of the type at issue in this case.¹¹ Contrary to respondents' assertion, however, the distinction is not that continuing conditions cannot violate the Eighth Amendment unless they are imposed as a result of persistent malicious cruelty, whereas one-time events require malice and sadism.¹²

Rather, the distinction that has been consistently applied by this Court is that state of mind is relevant in judging one-time events challenged under the Eighth Amendment, but is not relevant in the analysis of punishments or conditions imposed as a result of official policy, custom, or pattern of nonfeasance.¹³ See Petitioner's Brief at 24-30.

¹¹ Petitioner's contention on this point is in no way inconsistent with the position taken by the petitioner in *McCarthy v. Bronson, et al.*, No. 90-5635, cert. granted, 111 S.Ct. — (12/10/90).

¹² Although the distinction may often appear to be a distinction between damages cases and injunctive actions, it is not always so. All injunctive actions involve continuing practices, and many damages actions challenge one-time or short-term events. Some damages actions, however, involve harm caused by continuing conditions. See the discussion of *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987), and *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), cert. denied, 109 S.Ct. 68 (1988), *supra*, p. 10. Of course, there are also defenses available in damages actions. See Petitioner's Brief at 25, n.23. The defenses available in a damages action, but not an injunctive action, include the defense that a professional was unable to follow professional standards because of budgetary constraints. See *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

¹³ Respondents claim that *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), demonstrates that all Eighth Amendment challenges require an inquiry into state of mind. See Respondents' Brief at 16-17. Again, *Francis* is consistent with the distinction between one-time events and continuing conditions im-

Petitioner agrees with respondents that the amicus United States' hypothetical case of a nonfunctioning boiler during a cold winter usefully demonstrates the circumstances in which analysis of state of mind is relevant.¹⁴

If prison officials turned off the boiler with the intent of causing pain and suffering to the prisoners, then the deprivation of heat could constitute the imposition of pain without penological justification.¹⁵ Similarly, if prison officials refused to supply heat in order to save money,¹⁶ with deliberate indifference to the resultant suf-

posed as a result of policy, unofficial custom, or pattern of conduct. That case involved a challenge, under the due process clause, to the issuance of a second death warrant after the initial attempt to electrocute the prisoner failed because of a latent defect in the electrocution apparatus. The four-person plurality emphasized the accidental nature of the failed electrocution attempt. Justice Frankfurter, whose concurrence provided the fifth vote for refusing to find a constitutional violation, stated that "[t]he fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions." 329 U.S. at 471. Thus, *Resweber* is consistent with the contention that a custom or practice of utilizing a painful, unreliable method of execution would violate the Eighth Amendment.

¹⁴ Respondents concede in their brief at p. 31, n.23, that a failure to supply heat in the winter could amount to an Eighth Amendment violation.

¹⁵ Respondents do not suggest that there is a penological justification for deliberately failing to supply heat to prisoners. There may be cases in which continuing harsh conditions are imposed for penological reasons (see, e.g., *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), cert. denied, 109 S.Ct. 3193 (1989)), but that is not the case here.

¹⁶ Respondents urge that their decisions regarding conditions are entitled to deference because these decisions spring from "legitimate governmental economic interests attendant to the effective management of a detention facility." Respondents' Brief at 11-12. However, federal courts have uniformly held that a lack of funds or a desire to save money cannot justify unconstitutional prison conditions. See *Rozecki v. Gaughan*, 459 F.2d 6 (1st Cir. 1972). In that case, prisoners at the Massachusetts Correctional Institution Treat-

fering, such a practice could also involve the imposition of pain without penological justification.¹⁷ On the other hand, if the boiler breaks, even through the negligence of prison officials, this event by itself would not give rise to a constitutional violation.¹⁸ Whatever the cause of the

ment Center filed a complaint alleging that grossly inadequate heat led to physical ills. The court of appeals reversed the dismissal of the complaint and held that the defendants' personal good faith was no defense against injunctive relief:

The result, not the specific intent, is what matters; the concern is with the "natural consequences" of action or inaction. *Monroe v. Pape*, 1961, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492; *Pierson v. Ray*, 1967, 386 U.S. 547, 556, 87 S.Ct. 1213, 18 L.Ed.2d 288. "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." *Jackson v. Bishop*, 8 Cir., 1968, 404 F.2d 571, 580 (Blackmun, J.).

Id. at 8. See also *Gates v. Collier*, 501 F.2d 1291, 1319-1320 (5th Cir. 1974), and cases cited therein. As this Court has recognized, "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny [them] than to afford them." *Watson v. City of Memphis, Tenn.*, 373 U.S. 526, 537 (1963) (desegregation of public parks).

¹⁷ Cf. *Estelle v. Gamble*, 429 U.S. 97, 103-105 (1976):

In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

(Citations and footnotes omitted).

¹⁸ Thus, respondents are wrong to claim that petitioner argues for a strict liability standard. See Respondents' Brief at 23. Strict

boiler breakdown, however, officials must take prompt steps to correct it, since they know of the need for heat and they have an affirmative duty to supply shelter.¹⁹ If the boiler cannot be repaired immediately, prison officials could meet their duty in the short term by supplying extra blankets and clothing, even though prisoners would continue to suffer because of the lack of heat.

A continued refusal to repair the boiler, however, amounts to a conscious choice, or at least a deliberately indifferent choice, to deny prisoners a necessary element of shelter. Settled principles of Eighth Amendment law support the grant of injunctive relief to require that adequate heat, and other elements of shelter, be provided.

The example of lack of heat is particularly appropriate in the context of this case. Although respondents argue that petitioner urges a standard that would impose strict liability for equipment failure, this is not the issue here. Rather, this case involves petitioner's allegations that, on a continuing basis, the respondents have failed to carry out their duties to provide minimally adequate shelter. Indeed, respondents have attached to their brief the letter from petitioner to respondents, dated July 8, 1986, stating:

7th: In winter, there is no heating system in "C" Dormitory. This has been like so since this Facility has been opened in 1983. I will also bring to your attention that there is insufficient clothing given these men for winter since there is no heating sys-

liability is a concept that applies to damages actions and criminal liability, not injunctive actions. No Supreme Court case in the last twenty years has applied the concept of strict liability to injunctive actions. Rather, strict liability is a concept that relates to tort and tort-like damages (*see, e.g., Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 322 (1990)); contractual liability (*see, e.g., Ricketts v. Adamson*, 107 S.Ct. 2680, 2691, n.11 (1987) (Brennan, J., dissenting)); and criminal liability (*see, e.g., Osborne v. Ohio*, 110 S.Ct. 1691, 1698, n.9 (1990)).

¹⁹ See *DeShaney v. Winnebago County DSS*, 109 S.Ct. 998, 1005-1006 (1989).

tem in the dormitory listed. Such is an infliction of cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

* * *

I shall await your response to these conditions listed by me above and certainly request, again, that every listed violation be corrected forthwith. In the event that no changes are made within a reasonable time, be advised that I shall be forced to file a lawsuit against you and all prison personnel involved in these unhealthy conditions and cruel and unusual punishment imposed upon me without cause or justification.²⁰

Respondents' Appendix at 15. The complaint in this case was filed on August 28, 1986, and petitioner's motion for summary judgment on November 10, 1986. App. 1.

This boiler analysis illustrates that when prisoners are subjected to continuing, rather than short-term or one-time,²¹ conditions that deprive them of a basic necessity

²⁰ Petitioner's affidavit contains similar assertions. See App. 33-34. Petitioner's letter was not included in the appendix submitted in the court of appeals. The court of appeals accordingly did not see the letter and appears not to have been aware of petitioner's claim that he brought the conditions to respondents' attention before filing suit. Thus, the dictum from the court of appeals that the record showed only negligence apparently did not take into account petitioner's notice of the conditions to respondents. Petitioner's counsel in this Court did not see the letter as part of the original record in the trial court until after the compilation of the Joint Appendix.

²¹ At p. 44 of their brief, respondents cite a number of court of appeals summary judgment cases that they argue support their position. In fact, all four cases cited by respondents involve actions by individual staff that resulted in one-time or short-term deprivations visited upon an individual prisoner; none involved a continuing condition of confinement. See, e.g., *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988):

In *Lewis [v. Lane]*, 816 F.2d 1165, 1171 (7th Cir. 1987)], we held, as Harris points out, that summary judgment was inappropriate More importantly for the purposes of this case, however, *Lewis* involved prison policies and practices affecting

of life, prison officials have violated a duty imposed by the Constitution. See Petitioner's Brief at 25-29. The consequences of the failure to perform this affirmative duty are obvious and foreseeable. If prison officials violate that affirmative duty by depriving prisoners of the minimal civilized measure of life's necessities on an ongoing basis, any state of mind requirement under the Eighth Amendment is necessarily satisfied. Accordingly, when a court analyzes an injunctive challenge to continuing prison conditions, a separate inquiry into state of mind is redundant.²²

all prisoners and not just an isolated instance of negligence temporarily inconveniencing only one inmate.

Similarly, *Lopez v. Robinson*, 914 F.2d 486, 491-492 (4th Cir. 1990), cited at pp. 15-16 of the Amici Curiae Brief filed by various states, involves the short-term shut-off of water to prison cells after lightning struck the electrical lines that supplied power to the water pumps. During the water shut-off, the warden ordered that water and ice be delivered to every prisoner. Accordingly, *Lopez* is consistent with petitioner's argument that short-term or one-time events, but not continuing conditions, may require an analysis of official state of mind.

For the reasons given above, state of mind may well be relevant in Eighth Amendment analysis of one-time or short-term conduct by officials. Such analysis, however, is unnecessary and redundant in the context of continuing practices and customs. Those courts that have undertaken such an analysis, other than the lower court in this case, however, have concluded that a consistent pattern of conduct that ignores a known or obvious risk is sufficient to establish deliberate indifference where the conduct results in the deprivation of a basic necessity of life, such as medical care. See *DeGidio v. Pung*, — F.2d —, 1990 WL 191501 (8th Cir.) (12/4/90) and *Kelley v. McGinnis*, 899 F.2d 612, 617-618 (7th Cir. 1990). See also the cases cited in petitioner's brief at pp. 28-29. Accordingly, petitioner was not required to put the respondents' state of mind in issue in opposing their motion for summary judgment. If respondents are wrong about the state of mind issue, then their summary judgment argument about state of mind fails.

²² Even if state of mind were relevant, it was error for the district court in this case to resolve the issue by simply adopting the assertions in respondents' affidavits. From petitioner's averment that he apprised respondents of unhealthy and dangerous conditions and they took no remedial action other than to refer the letter to a staff member who did not, and could not, correct the conditions

IV. THE CONDITIONS OF CONFINEMENT ALLEGED BY PETITIONER CONSTITUTE PUNISHMENT

At pages 9-12 of their brief, respondents argue that this Court must first determine whether the conditions challenged by petitioner constitute punishment, citing *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell*, however, unlike this case, involved a due process challenge to conditions of pretrial detention. In that context, it was necessary to determine whether the conditions constituted punishment at all.²³

In contrast, in Eighth Amendment challenges to the conditions of confinement of convicted prisoners, "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." *Hutto v. Finney*, 437 U.S. 678, 685 (1978). See also *Rhodes*, 452 U.S. at 345, calling this principle "unquestioned" and setting forth the applicable standard "when the conditions of confinement compose the punishment at issue." *Id.* at 347. Accordingly, the conditions under which prisoners are confined pursuant to criminal convictions are, by definition, punishment. The issue before this Court is whether these conditions entail cruel and unusual punishment.

V. THE PETITIONER HAS ALLEGED CONDITIONS THAT, IF PROVEN, INVOLVE SERIOUS DEPRIVATIONS OF BASIC HUMAN NEEDS

Respondents attempt to argue that the petitioner has not alleged conditions that involve serious deprivations of

(App. 33), a reasonable trier of fact could conclude that respondents acted with a culpable state of mind. As this Court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986):

[T]he plaintiff, to survive the defendant's [summary judgment] motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

²³ *Bell* also indicated that conditions of detention that required pretrial detainees "to endure genuine privations and hardships over an extended period of time" might raise serious questions under the due process clause as to whether these conditions amounted to punishment. *Id.* at 542.

basic human needs by restating those allegations in a manner that minimizes the seriousness of the conditions described by petitioner. See Respondents' Brief at 13-14. Yet respondents do not challenge the petitioner's summary of the parties' opposing contentions at pp. 4-6, n.3, of petitioner's brief.²⁴ Petitioner's affidavits alleged filth, foul odors, unclean food, vermin infestation, a stifling lack of ventilation coupled with high temperatures in summer and frigid temperatures in winter, bunks wet with rain from malfunctioning windows, and psychotic prisoners and prisoners with open sores mixed into the general population.²⁵ In addition, the respondents admit that some prisoners in the dormitory have age-related health problems.

²⁴ It is black letter law that the evidence of the party opposing summary judgment is to be taken as true, and all justifiable inferences are to be drawn in that party's favor. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Thus, for example, when respondents cite their affidavits for the contentions that the heaters are in good working order, the restrooms are frequently cleaned, and the institution regularly exterminated, respondents are simply contradicting the petitioner's affidavits. Respondents' Brief at 43.

Indeed, the district court made the same mistake about summary judgment. At p. 4 of respondents' brief, they note that the district court made a finding that the respondents had not deprived petitioner of the minimal civilized measure of life's necessities. Respondents fail to note that the court of appeals held that the trial court had erred in granting summary judgment by adopting the findings in respondents' affidavits. App. 66.

²⁵ Respondents dismiss as "conclusory" the allegations in petitioner's affidavits regarding heating, lack of ventilation, and the presence of vermin. Respondents' Brief at 40. In fact, petitioner's affidavits contain numerous specific allegations about these claims. See, e.g., App. at 16 (lack of ventilation combined with high temperatures causes prisoners to experience heat-related rashes and difficulty breathing); App. at 24 (walls and floors are cracked, and frigid air comes through the walls during winter months; prisoners, who are required to sleep with their heads toward the windows, use their blankets at the heads of their beds because of the frigid air); and App. at 35 (insects enter through the cracked walls and floors).

The lower courts did not conclude that the conditions alleged by petitioner failed to describe objective conditions serious enough to violate the Eighth Amendment. Indeed, the court of appeals held that petitioner's affidavits were "more than colorable" and further noted that "[s]everal circuits have found eighth amendment violations arising from conditions similar to those alleged by the [petitioner]." App. 66. (Citations omitted). Accordingly, based on the petitioner's affidavits, it was error to grant summary judgment against petitioner.

VI. IN EVALUATING PRISON CONDITIONS UNDER THE EIGHTH AMENDMENT, COURTS MUST CONSIDER THE TOTALITY OF CONDITIONS

Respondents' argument that "each challenged condition must constitute cruel and unusual punishment," and that courts may not consider the totality of conditions, flies in the face of settled precedent from this Court.²⁶ In *Rhodes v. Chapman*, 452 U.S. at 347, this Court held that conditions of confinement, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. (Emphasis added). See also *id.* at 363 n.10 (Brennan, J., concurring) ("The Court today adopts the totality-of-the-circumstances test") (citations omitted).²⁷ In *Hutto v. Finney*, 437 U.S. at 688, this

²⁶ The claims of excessive heat and the presence of psychotic prisoners in the dormitories raise Eighth Amendment claims independent of any related conditions.

²⁷ Respondents argue that this Court in *Rhodes* rejected the totality of the circumstances test, because the trial court applied that test, and this Court reversed the judgment of the trial court. In view of the language of both the majority and the concurrence cited in the text, this position is untenable. This Court disagreed with the trial court's conclusion that double-celling at the facility in question constituted cruel and unusual punishment, but in no way implied that conditions should not be considered in their totality. Indeed, this Court specifically considered the effect of double-celling on food, medical care, sanitation, and violence. 452 U.S. at 348.

Court noted "the interdependence of the conditions producing the [Eighth Amendment] violation." Thus, the Court in *Hutto* approved the action of the lower court in determining whether the Eighth Amendment had been violated by examining conditions "taken as a whole." *Id.* at 687. See also Petitioner's Brief at 36-39.

Moreover, the novel approach advocated by respondents is totally unworkable. Respondents do not explain exactly what an "individual condition" is. For example, in the case at bar, do petitioner's allegations that the air in the dormitories is hot, stagnant and foul-smelling constitute two conditions ("heat" and "ventilation") or one? Do the allegations of dirty toilet facilities, vermin infestation, and unwholesome food preparation pertain to three separate conditions, or do they all fall under the rubric of "sanitation"? Does the allegation that physically ill prisoners are housed in the dormitory due to a lack of infirmary space relate to "protection from disease" or "overcrowding"?

Prisoners do not experience "individual conditions" one at a time; they experience these conditions, and the interactions among them, in their totality.²⁸ This Court wisely recognized this reality in *Rhodes* and *Hutto*, and should now reject the unrealistic and unworkable formulation proposed by respondents.

Respondents also assert that the totality test is "inconsistent with the [*Rhodes*] majority's instructions to use 'objective criteria' to the greatest extent possible." Respondents' Brief at 22 n.17. *Rhodes* holds that conditions violate the Eighth Amendment when they "deprive inmates of the minimal civilized measure of life's necessities." 452 U.S. at 347. Whether prisoners are deprived of the basic necessities of life cannot be determined without examining the totality of the conditions under which they are confined. The objective conditions to which prisoners are subjected include the interaction among the various conditions.

²⁸ There are common-sense limits to this doctrine. Some conditions may be sufficiently discrete that they are not cumulative in their effect on prisoners. See *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986) ("a number of unrelated conditions, each of which satisfy eighth amendment requirements, cannot in combination amount to an eighth amendment violation") (emphasis in

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand this case to the district court for trial.

Respectfully submitted,

ELIZABETH ALEXANDER *

DAVID C. FATHI

ALVIN J. BRONSTEIN

MARK J. LOPEZ

NATIONAL PRISON PROJECT

OF THE AMERICAN CIVIL

LIBERTIES UNION FOUNDATION

1875 Connecticut Ave., N.W., #410

Washington, D.C. 20009

(202) 234-4830

GORDON J. BEGGS

ELINOR R. ALGER

ACLU OF OHIO FOUNDATION

1223 West 6th Street

Cleveland, OH 44113

(216) 781-6278

JOHN A. POWELL

STEVEN A. SHAPIRO

AMERICAN CIVIL LIBERTIES

UNION FOUNDATION

132 W. 43rd Street

New York, NY 10036

(212) 944-9800

Counsel for Petitioner

* Counsel of Record

original). But conditions pervasively affecting the prisoners' physical environment, like those alleged here, are particularly appropriate for a totality analysis. See *Tillery v. Owens*, 907 F.2d at 428 (double celling could be "unbearable" in connection with violence, filth, and fire hazards).

No. 89-7376

9

Supreme Court, U.S.

FILED

NOV 13 1990

JOSEPH P. SPANWOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

PEARLY L. WILSON, PETITIONER

v.

RICHARD SEITER, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DAVID K. FLYNN
THOMAS E. CHANDLER
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

32/11

QUESTION PRESENTED

The United States will address the following question:
Whether the "malicious and sadistic" intent requirement of *Whitley v. Albers*, 475 U.S. 312 (1986), applies to Eighth Amendment challenges to conditions of confinement that are not a response to needs of prison safety and security.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
The court of appeals erred in applying the "malicious and sadistic" intent standard to an Eighth Amendment claim challenging general con- ditions of confinement	6
A. The "malicious and sadistic" intent standard does not apply to a claim challenging general conditions of confinement	6
B. The claim that general prison conditions violate the Eighth Amendment should be resolved by examining the objective condi- tions at the particular institution, not the subjective state of mind of the responsible officials	14
C. If a state of mind inquiry is relevant in a prison conditions of confinement case, the appropriate requirement is that of "deliber- ate indifference"	22
Conclusion	27

TABLE OF AUTHORITIES

Cases:

<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	13, 25
<i>Berg v. Kincheloe</i> , 794 F.2d 457 (9th Cir. 1986) ...	14
<i>Berry v. City of Muskogee</i> , 900 F.2d 1489 (10th Cir. 1990)	14, 22, 23, 24
<i>Birrell v. Brown</i> , 867 F.2d 956 (6th Cir. 1989)	4
<i>City of Canton v. Harris</i> , 109 S. Ct. 1197 (1989) ...	23, 24

IV

Cases—Continued:

	Page
<i>Corselli v. Coughlin</i> , 842 F.2d 23 (2d Cir. 1988) ...	12
<i>Cortez-Quinones v. Jimenez-Nettleship</i> , 842 F.2d 556 (1st Cir. 1988)	23
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986)	21
<i>DeShaney v. Winnebago County Social Services Dep't</i> , 489 U.S. 189 (1989)	21
<i>Duckworth v. Franzen</i> , 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986)	24
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	7, 8, 10, 15, 16, 18, 20, 21, 22
<i>Evans v. Dugger</i> , 908 F.2d 801 (11th Cir. 1990) ...	14
<i>Ford v. Wainwright</i> , 447 U.S. 399 (1986)	17
<i>Foulds v. Corley</i> , 833 F.2d 52 (5th Cir. 1987)	14
<i>Gillespie v. Crawford</i> , 833 F.2d 47 (1987), vacated, 858 F.2d 1101 (5th Cir. 1988)	14, 21, 23
<i>Graham v. Connor</i> , 109 S. Ct. 1865 (1989)	15, 26
<i>Gregg v. Georgia</i> , 428 U.S. 158 (1976)	8, 16, 17
<i>Hoptowit v. Ray</i> , 682 F.2d 1237 (9th Cir. 1982) ...	15
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	18, 19
<i>Illinois v. Rodriguez</i> , 110 S. Ct. 2793 (1990)	26
<i>Inmates of Occoquan v. Barry</i> , 844 F.2d 828 (D.C. Cir. 1988)	15, 20
<i>Johnson v. Glick</i> , 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)	6
<i>LaFaut v. Smith</i> , 834 F.2d 389 (4th Cir. 1987) ..	14, 22, 23
<i>Louisiana ex rel. Francis v. Resweber</i> , 329 U.S. 459 (1947)	16
<i>Morgan v. District of Columbia</i> , 824 F.2d 1049 (D.C. Cir. 1987)	14, 23
<i>O'Lone v. Estate of Shabazz</i> , 482 U.S. 342 (1987) ..	25
<i>Pell v. Procunier</i> , 417 U.S. 817 (1974)	13
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	13, 25
<i>Pugh v. Locke</i> , 559 F.2d 283 (5th Cir. 1977), rev'd in part, 438 U.S. 781 (1978)	18
<i>Revere v. Massachusetts General Hospital</i> , 463 U.S. 239 (1983)	25
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	4, 5, 8, 9, 17, 18-19, 20, 21

V

Cases—Continued:

	Page
<i>Robinson v. California</i> , 370 U.S. 660 (1962)	2, 17
<i>Ruefly v. Landon</i> , 825 F.2d 792 (4th Cir. 1987) ...	23
<i>Stubbs v. Dudley</i> , 849 F.2d 83 (2d Cir. 1988), cert. denied, 489 U.S. 1034, 1036 (1989)	12
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988)	17
<i>Thornburgh v. Abbott</i> , 109 S. Ct. 1874 (1989)	13
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	8
<i>Unwin v. Campbell</i> , 863 F.2d 124 (1st Cir. 1988) ..	14
<i>West v. Atkins</i> , 487 U.S. 42 (1987)	21
<i>Whitley v. Albers</i> , 475 U.S. 312 (1986)	passim

Constitution and statutes:

U.S. Const.:

Amend. VIII (Cruel and Unusual Punishments Clause)	passim
Amend. XIV	2
Due Process Clause	21, 25

Civil Rights of Institutionalized Persons Act, 42

U.S.C. 1997 *et seq.*:

42 U.S.C. 1997	1
18 U.S.C. 1997a(a)	1
18 U.S.C. 1997c(a)	2
18 U.S.C. 4001	2
18 U.S.C. 4042	2
42 U.S.C. 1983	2, 21, 23
English Bill of Rights of 1689	15

Miscellaneous:

Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif. L. Rev. 839 (1969)	16
J. Murray, <i>A New English Dictionary on Historical Principles</i> (1893)	22
<i>The Oxford English Dictionary</i> (1933)	22

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-7376

PEARLY L. WILSON, PETITIONER

v.

RICHARD SEITER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the issue whether the “malicious and sadistic” intent requirement of *Whitley v. Albers*, 475 U.S. 312 (1986), applies to prisoners’ Eighth Amendment challenges to their general conditions of confinement. The United States has responsibility for enforcing the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, which authorizes the Attorney General to institute a civil injunctive action against state officials whenever he has reason to believe they are “subjecting persons residing in or confined to [a prison or correctional facility] * * * to egregious or flagrant conditions which deprive such persons” of rights protected by the Constitution. 42 U.S.C. 1997a(a). CRIPA also authorizes the Attorney General to intervene in certain actions seek-

ing relief from unconstitutional conditions in prisons or correctional institutions. 42 U.S.C. 1997c(a).

In addition, the Bureau of Prisons, operating under the direction of the Attorney General, has the responsibility to manage federal correctional institutions and to provide for the "safekeeping, care, and subsistence" of persons maintained in such facilities. 18 U.S.C. 4001, 4042. Finally, the Department of Justice defends actions brought by federal inmates alleging unconstitutional prison conditions.

STATEMENT

1. In 1986, petitioner, a prisoner at the Hocking Correctional Facility (HCF) in Nelsonville, Ohio, filed suit against state prison officials under 42 U.S.C. 1983, alleging that the conditions of confinement at HCF violated his rights under the Eighth and Fourteenth Amendments.¹ Specifically, petitioner alleged that overcrowding, excessive noise, inadequate heating in winter and cooling in summer, improper ventilation, unsanitary restrooms, unsanitary eating conditions, and housing with mentally and physically ill inmates amounted to cruel and unusual punishment. Petitioner requested declaratory and injunctive relief, as well as compensatory and punitive damages.² J.A. 2-9, 53-54, 62-63.

The parties filed cross-motions for summary judgment. Petitioner supported his motion with affidavits from inmates describing the alleged unconstitutional conditions of confinement. Several of these inmates also stated that

¹ The Eighth Amendment, held applicable to the States by the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

² Everett Hunt, Jr., a second plaintiff, is no longer confined at HCF.

they had contacted prison officials concerning the conditions, but the officials took no action. J.A. 10-39. The respondents' supporting affidavits explained efforts taken by prison officials to improve conditions within the prison, and contradicted certain of petitioner's claims concerning existing conditions at HCF. J.A. 40-52.

The district court granted respondents' motion for summary judgment and dismissed the action. J.A. 53-61. The court recognized that conditions of confinement may, under certain circumstances, constitute cruel and unusual punishment, and noted that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the [Eighth Amendment]." J.A. 53-61, quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Relying on respondents' affidavits, the district court concluded that "plaintiffs have been provided with at least the minimal civilized measure of life's necessities and have not been deprived of their Eighth Amendment right to be free from cruel and unusual punishment." J.A. 59. The court also concluded that "HCF officials do not demonstrate obdurate or wanton behavior regarding the conditions of HCF." *Ibid.*

2. The court of appeals affirmed. J.A. 62-74. The court first held that the district court had erred to the extent it had accepted the accuracy of contested statements in respondents' affidavits—thus weighing the evidence—in concluding that the confinement conditions did not amount to cruel and unusual punishment under the Eighth Amendment. J.A. 66. Nevertheless, the court explained, if the circumstances set forth in petitioner's affidavits would not support an Eighth Amendment violation in any case, they did not raise material issues for trial. J.A. 66-70. Examining petitioner's affidavits, the court concluded that petitioner's claims relating to inadequate cooling, housing with mentally ill inmates, and overcrowding, even if true,

did not demonstrate the type of "seriously inadequate and indecent surroundings" required to establish an Eighth Amendment violation. *Id.* at 68, quoting *Birrell v. Brown*, 867 F.2d 956, 958 (6th Cir. 1989).

With regard to petitioner's remaining claims, however, the court found that the conditions described in petitioner's affidavits were suggestive of conditions that could violate the Cruel and Unusual Punishments Clause. J.A. 68. Accordingly, the court proceeded to consider whether petitioner had set forth sufficient facts to raise an inference that respondents acted with the requisite "state of mind" to support an Eighth Amendment claim. J.A. 70-74. The court noted that *Whitley v. Albers*, 475 U.S. at 319, had stated that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Punishments Clause." J.A. 71. The court added that in the Sixth Circuit "the *Whitley* standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order." *Ibid.*

Applying those principles, the Sixth Circuit concluded that petitioner's affidavits failed to support a reasonable inference that the respondents acted with "obduracy and wantonness." J.A. 71-74. The court stressed that petitioner "do[es] not contend that the [respondents] have made no efforts to provide [him] with minimally decent confinement conditions." J.A. 73. Rather, the court observed, petitioner's complaints "are aimed at the results of those efforts." *Ibid.* After reviewing the "undisputed record" indicating that prison officials had taken affirmative steps to improve conditions, the court concluded that "confinement conditions may constitute cruel and unusual punishment only if such conditions 'compose the punishment at issue.'" *Ibid.*, quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). "Nothing in [petitioner's] affidavits

implies that [respondents] used confinement conditions to punish [petitioner]." J.A. 73. Finally, the court observed (*ibid.*):

[T]he *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior. At best, [petitioner's] claim evidences negligence on [respondent's'] parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an [E]ighth [A]mendment claim.

SUMMARY OF ARGUMENT

The court of appeals erred in requiring "behavior marked by persistent malicious cruelty" in a case challenging the general and pervasive conditions of confinement under the Eighth Amendment. The court purported to apply the standard set forth in *Whitley v. Albers*, 475 U.S. 312, 320 (1986), but that case required a showing of a "malicious[] and sadistic[]" state of mind in the context of actions to quell a prison disturbance. The considerations that prompted the Court to formulate that standard—the intense concern that prison officials must have for safety and security in a potentially explosive situation, and the need for quick decisions—do not apply in a challenge to general prison conditions.

We believe the correct Eighth Amendment analysis, as applied to a case of this character in which an inmate challenges systemic prison conditions forming an integral part of his confinement, should focus on the objective conditions in the prison, rather than on the state of mind of particular officials. See *Rhodes v. Chapman*, 452 U.S. 337 (1981). In our view, neither the language, history, nor intent of the Eighth Amendment supports a separate inquiry

into the officials' state of mind. Rather, the issue is simply whether the punishment itself is objectively "cruel and unusual." The absence of an inquiry into the officials' intent makes it especially important that an Eighth Amendment claimant demonstrate under a rigorous standard that the conditions at issue are truly "cruel and unusual."

If a state of mind requirement does apply here, however, the "deliberate indifference" standard fits the conduct at issue. That standard, which falls between simple negligence and malicious and sadistic intent, focuses attention on whether responsible officials had knowledge (actual or constructive) of conditions likely to offend the Constitution, and failed to take action to remedy those conditions. The standard should be applied with strong deference to the difficult circumstances confronting prison officials in managing a prison facility.

ARGUMENT

THE COURT OF APPEALS ERRED IN APPLYING THE "MALICIOUS AND SADISTIC" INTENT STANDARD TO AN EIGHTH AMENDMENT CLAIM CHALLENGING GENERAL CONDITIONS OF CONFINEMENT

A. The "Malicious And Sadistic" Intent Standard Does Not Apply To A Claim Challenging General Conditions Of Confinement

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court held that the question whether the use of excessive force to restore order in a prison disturbance violates the Eighth Amendment "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 320-321, quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). In this case, the court of appeals ap-

parently believed that the *Whitley* standard applies to the very different type of Eighth Amendment violation alleged here—a challenge to general and pervasive prison conditions. We believe that the court of appeals' application of the *Whitley* test in this context constitutes error.³

1. To put *Whitley* in context, it is necessary to examine two of this Court's precedents addressing the application of the Eighth Amendment to claims by prisoners challenging their experiences in confinement.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court considered an inmate's claim under the Eighth Amendment based on the failure of prison officials to render adequate medical care for an injury he received in prison. The Court began by stating that the Eighth Amendment proscribes more than physically barbarous punishments; it also

³ In this action, petitioner sought injunctive relief against respondents in their official capacity, and damages against respondents in their individual capacity. The issue before this Court, at this preliminary stage, presents a question common to both aspects of the case: the appropriate standard for determining whether petitioner's allegations in his pleadings and affidavits, if proved, are sufficient to establish a violation of the Eighth Amendment. Not raised at this stage are issues relevant to the imposition of personal liability for damages if such a violation has occurred. Those issues would include questions of causation and of personal responsibility for the conditions complained of (*i.e.*, to what extent may a particular individual be held personally accountable for those conditions), and of the appropriate scope of qualified immunity in a conditions of confinement case. For example, we believe there is a significant difference, for purposes of personal liability, between a prison official who has unreasonably failed to resort to available alternatives in order to alleviate or eliminate inhumane prison conditions, and one who has been unable to correct those conditions as a result of fiscal constraints beyond his control. See Brief for the United States as Amicus Curiae in *Brutsche v. Cleveland-Perdue*, No. 89-1167, cert. denied (Oct. 29, 1990), at pp. 17-18. (We have furnished the parties here with copies of our brief in *Brutsche*.)

reaches punishments that "are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,'" *id.* at 102, quoting *Trop v. Dulles*, 356 U.S. 86, 100, 101 (1958) (plurality opinion), or that "involve the unnecessary and wanton infliction of pain". 429 U.S. at 102-103, quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Those principles led the Court to conclude that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton' infliction of pain * * * proscribed by the Eighth Amendment." *Id.* at 104.

The Court emphasized in *Estelle* that not every claim of inadequate medical treatment violates the Eighth Amendment. 429 U.S. at 105. The "inadvertent failure" to provide medical care, the Court explained, does not constitute an unnecessary and wanton infliction of pain; thus, claims of negligent diagnosis or treatment of a medical condition do not state a violation of the Eighth Amendment. *Id.* at 105-106. The Court concluded by characterizing the level of fault required to state a claim of "deliberate indifference" (*id.* at 106):

Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Five years later, in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court considered an Eighth Amendment challenge to a quite different prison practice: a condition of confinement involving a practice of assigning a single cell for every two inmates at a particular correctional

facility. In reviewing that challenge, the Court articulated the basic principles applicable to Eighth Amendment cases involving conditions of confinement. The Court reaffirmed the underlying rule that punishments are cruel and unusual when they involve "unnecessary and wanton infliction of pain," or inflict pain "totally without penological justification." *Id.* at 346. But the Court also explained that "the Constitution does not mandate comfortable prisons," *id.* at 349, and that "restrictive and even harsh" conditions "are part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 347.

While recognizing that no "static 'test'" can govern the judicial inquiry into whether conditions of confinement violate standards drawn from the Eighth Amendment, the Court admonished that such judgments "should neither be nor appear to be merely the subjective views of judges," but "should be informed by objective factors to the maximum possible extent." 452 U.S. at 346. Thus, when "the conditions of confinement compose the punishment at issue," the Eighth Amendment is violated when those conditions "result[] in unquestioned and serious deprivations of basic human needs," or deprive inmates of the "minimal civilized measure of life's necessities." *Id.* at 347. Applying those standards to the practice of "double-celling" involved in that case, the Court found no constitutional violation. *Id.* at 347-350.⁴

2. In *Whitley v. Albers*, *supra*, the Court considered "what standard governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell

⁴ The Court took into account that the double celling at issue "did not lead to deprivations of essential food, medical care, or sanitation," "increase violence among inmates," or "create other conditions intolerable for prison confinement." 452 U.S. at 348.

a prison riot." 475 U.S. at 314. The Court initially observed that not all actions touching a prisoner's interests are susceptible to Eighth Amendment analysis; only the "unnecessary and wanton infliction of pain" rises to the level of a violation. 475 U.S. at 319. As illustrated by *Estelle v. Gamble*, "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Ibid.* From these principles, the Court derived the generalization that:

[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Ibid. The Court added, however, that the requirement of proving "unnecessary and wanton infliction of pain" is a general criterion that should be applied "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.* at 320.

Keeping in mind the need to tailor Eighth Amendment requirements to the type of conduct under scrutiny, the Court concluded that the "deliberate indifference" standard, applied to the denial of medical treatment in *Estelle*, should not govern challenges to the use of force in prison security measures taken to prevent or resolve disturbances. In the latter class of cases, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 475 U.S. at 320-321. The Court contrasted the

standard employed in *Estelle* by noting that in evaluating whether a failure to provide medical care violates the Constitution, a court would normally have no need to balance "competing institutional concerns for the safety of prison staff or other inmates." *Id.* at 320. But where force is applied to calm a prison disruption, "prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." *Ibid.* In that setting, "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Ibid.*

3. In the present case, petitioner challenged the general and endemic conditions of his confinement, not the application of force in a particular prison disturbance. Nevertheless, the court of appeals essentially transposed *Whitley's* heightened "malicious and sadistic" test to the present context, stating that *Whitley* is "not confined to the facts of that case; that is to suits alleging use of excessive force in an effort to restore prison order." J.A. 71.⁵

We disagree with the court of appeals' transposition of the *Whitley* test to the circumstances of this case. Al-

⁵ The court of appeals never actually quoted the "malicious and sadistic" language used by the Court in *Whitley*; rather, the court stated that the "*Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty." J.A. 73. If anything, however, the court of appeals' paraphrase imposes an even more stringent test. A requirement of "persistent malicious cruelty" appears to require ongoing wrongful conduct, while the facts and analysis in *Whitley* itself imply that an isolated application of force can violate the Eighth Amendment if the requisite state of mind is established.

though the court correctly noted that the "obdurate and wanton" formulation serves as a general criterion applicable to Eighth Amendment claims, J.A. 71, the court failed to heed *Whitley*'s admonition that different types of conduct challenged under the Eighth Amendment implicate distinct concerns—an admonition that militates against a single standard for determining in every case whether a particular act or practice constitutes "the unnecessary and wanton infliction of pain." 475 U.S. at 320.⁶ A case challenging the systemic conditions of confinement implicates none of the policy considerations that led this Court to embrace a more rigorous intent standard for prison disturbance cases and other instances implicating legitimate security or other penological concerns.⁷

As the Court in *Whitley* noted, when officials must act to restore order within a prison, "decisions [are] necessarily made in haste, under pressure, and frequently without

⁶ *Whitley* can hardly be read to require a single test in all cases arising under the Eighth Amendment; the Court in *Whitley*, while fashioning a new standard for considering challenges to the use of force in a prison disturbance, expressly reaffirmed the holding in *Estelle* that the deliberate indifference standard applies to claims of inadequate medical attention. 475 U.S. at 320.

⁷ Of course, *Whitley* is not strictly limited to its facts. See *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988) (applying *Whitley*'s malicious and sadistic intent standard to a claim by an inmate injured by a prison official during a scuffle in the mess hall even though *Whitley* was distinguishable, "since that case involved a full scale prison riot"). In *Stubbs v. Dudley*, 849 F.2d 83, 86 (1988), the Second Circuit refused to apply *Whitley* to a claim that officials failed to protect an inmate from an assault at the hands of mob of prisoners, because a full-blown prison riot was not in progress at the time officials acted. Three Justices dissented from the denial of certiorari, arguing that *Whitley* was not limited to prison riots but applied in the setting of *Stubbs* because the same type of "competing institutional concerns" and need for "split-second decision[s]" found in *Whitley* were present there as well. *Dudley v. Stubbs*, 489 U.S. 1034, 1038 (1989).

the luxury of a second chance." 475 U.S. at 320. Further, prison disturbances involve a significant risk to the safety of inmates and staff. Prison officials must necessarily act to protect those persons, for "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823 (1974); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974); *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989). Consequently, Eighth Amendment standards must reflect the need to afford officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 475 U.S. at 321-322, quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

Very different considerations arise with respect to the general conditions prevailing at a prison facility. These conditions are likely to evolve as the consequence of policy decisions made over time, and shaped by such long-term factors as funding levels and available resources. Management of such continuing and integral features of prison confinement as the provision of food, the housing of inmates, and the cleaning of living quarters is not a process of reacting to emergencies; rather, it is part of the regular administration of the prison as a penal institution. And, while prison officials must consider their obligation to ensure security and safety within the prison in any decision affecting prison life, that factor does not have the same immediacy in establishing and maintaining general conditions of confinement as it does in dealing with a prison disturbance. Accordingly, the heightened standard of "malicious and sadistic" intent applied in *Whitley* is not appropriate here.⁸

⁸ Other than the present decision, the courts of appeals have uniformly rejected the extension of *Whitley*'s malicious and sadistic in-

B. The Claim That General Prison Conditions Violate The Eighth Amendment Should Be Resolved By Examining The Objective Conditions At The Particular Institution, Not The Subjective State Of Mind Of The Responsible Officials

The remaining issue is what state-of-mind requirement, if any, should apply to the claim here that the general, systemic conditions of a prison violate the prohibition of the Eighth Amendment. In our view, that inquiry should focus on the objective conditions at the prison, not on the intent of the responsible officials.⁹

tent standard to conditions of confinement cases. See, e.g., *Berry v. City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990) (*Whitley* "carefully preserved" the distinction between "the malicious and sadistic standard applicable in prison riot situations and the deliberate indifference standard applicable to more ordinary prison policy decisions"); *Evans v. Dugger*, 908 F.2d 801, 803-804 (11th Cir. 1990) (*Whitley* standard does not apply to claim of inadequate medical attention); *Gillespie v. Crawford*, 833 F.2d 47, 50 (1987) (per curiam) ("[p]rison conditions may violate the Eighth Amendment even if they are not imposed maliciously or with the conscious desire to inflict gratuitous pain"), vacated in other aspects, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc); *Foulds v. Corley*, 833 F.2d 52, 54-55 (5th Cir. 1987) (rejecting *Whitley* standard in challenge to conditions of confinement); *Morgan v. District of Columbia*, 824 F.2d 1049, 1057-1058 (D.C. Cir. 1987) (rejecting *Whitley* standard where an inmate was injured in a fight with another inmate allegedly as the result of prison overcrowding); *LaFaut v. Smith*, 834 F.2d 389, 391 (4th Cir. 1987) (rejecting *Whitley* standard in action by a paraplegic inmate challenging his conditions of confinement); *Berg v. Kincheloe*, 794 F.2d 457, 459-461 (9th Cir. 1986) (rejecting application of malicious and sadistic intent standard to claim by an inmate assaulted by another inmate). See also *Unwin v. Campbell*, 863 F.2d 124, 135 (1st Cir. 1988) (in qualified immunity context, the *Whitley* standard does not apply when institutional security is not at stake).

⁹ The court of appeals disposed of three of petitioner's claims in precisely that way, concluding that even if petitioner's allegations were true, those conditions did not rise to the level of Eighth Amendment violations. J.A. 66-70. With respect to the remaining claims, however,

1. The text of the Eighth Amendment does not contain any irreducible "intent" requirement.¹⁰ The language of the Amendment refers to "punishments," and thus to methods or kinds of punishment that are cruel and unusual. In context, the adjective "cruel" (like the word "unusual") is naturally read as describing the type of prohibited punishment alone, without respect to the subjective intent of the officials responsible for the punishment.¹¹

In addition, the history of the Amendment and its underlying values support its application to particular methods of punishment, irrespective of the mental state of the punisher. As this Court has recounted, the language of the Eighth Amendment was derived from the English Bill of Rights of 1689. In seventeenth century England, it is

the court addressed only whether petitioner alleged a state of mind sufficient to support an Eighth Amendment claim. *Id.* at 70-74. Since the proper application of Eighth Amendment standards other than the intent requirement is not at issue here, we express no view about whether any of those remaining claims involve conditions sufficiently harsh to constitute cruel and unusual punishment. We note, however, that if, as we believe, state of mind is not an element of a constitutional violation in a systemic conditions-of-confinement case, courts must exercise special caution in determining whether objective conditions are sufficiently egregious to violate inmates' constitutional rights. Cf. *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836-837 (D.C. Cir. 1988). See also pp. 25-26, *infra*, addressing the need for judicial deference to judgments of prison officials.

¹⁰ Although this Court has remarked that "the terms 'cruel' and 'punishment' clearly suggest some inquiry into subjective state of mind," *Graham v. Connor*, 109 S. Ct. 1865, 1873 (1989) (dictum), those terms, as used in the Eighth Amendment, do not invariably require an intent-based analysis.

¹¹ See *Estelle v. Gamble*, 429 U.S. at 116-117 (Stevens, J., dissenting) ("whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it").

generally believed, the phrase "cruel and unusual punishments" was directed against punishments not authorized by statute and beyond the jurisdiction of the sentencing court, or disproportionate to the offense involved. *Gregg v. Georgia*, 428 U.S. at 169 (opinion of Stewart, Powell, and Stevens, JJ.). See also Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif. L. Rev. 839, 860 (1969). Neither of these concerns necessarily requires the intentional or indifferent infliction of pain or discomfort. Moreover, in framing the Eighth Amendment, the American drafters were primarily concerned with prohibited certain *methods* of punishment (i.e., "torture[]" and other "barbarous" techniques), *id.* at 842; *Gregg*, 428 U.S. at 169-170. Again, these methods do not focus on the intent of the punisher. And, this Court has interpreted the Cruel and Unusual Punishments Clause so as to further its underlying purpose of embodying "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle v. Gamble*, 429 U.S. at 102. Those values also do not require proof of subjective intent.¹²

This Court's Eighth Amendment cases outside the prison conditions context, though they do not speak with one voice, have not always considered the intent of the officials applying the punishment. For example, in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Court held that a second attempt to electrocute an inmate, after a first effort had failed, was not unconstitutional, because the initial failure was "an unforeseeable accident," and "[t]here was no purpose to inflict unnecessary pain

¹² It is noteworthy that, in *Gregg*, where the Court first referred to the "unnecessary and wanton infliction of pain," 428 U.S. at 173, it was using the phrase to describe an excessive punishment, not to describe the state of mind of the person inflicting that punishment.

nor any unnecessary pain involved in the proposed execution." *Id.* at 464 (plurality opinion) (emphasis added). While the first part of the formulation focuses on the intent of government officials, the italicized phrase suggests that if the pain was truly "unnecessary," it would be unconstitutional even if accidental. In *Robinson v. California*, 370 U.S. 660, 666-667 (1962), the Court concluded that under the Eighth Amendment, a State cannot make it a criminal offense to be a narcotics addict; no showing of improper intention on the part of government actors is required. And much of the Court's capital punishment jurisprudence has measured the standards set by state law against the requirements of the Constitution without considering the state of mind of individual government actors.¹³ See also pp. 19-21, *infra* (discussing prison conditions cases).

2. Reasons of principle also support the use of an objective standard to resolve claims of systemically inadequate prison conditions. The constraints and hardships that characterize prison life are an integral part of the punishment imposed by confinement, not conditions incompatible with it. *Rhodes v. Chapman*, 452 U.S. at 347, 349. But the "wanton and unnecessary infliction of pain" on inmates cannot be justified by any legitimate penological interest. When general conditions of confinement are so severe that they result in "unquestioned and serious deprivations of basic human needs," or "deprive inmates of the minimal civilized measure of life's necessities," *id.* at

¹³ See, e.g., *Ford v. Wainwright*, 477 U.S. 399 (1986); *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Although the death penalty receives unique Eighth Amendment treatment, *id.* at 856 (O'Connor, J. concurring), the Court's consideration of the Amendment in that context without regard to intent is nevertheless relevant here.

347, the inmates are subjected to the kind of suffering that triggers Eighth Amendment concerns.¹⁴

The standards described in *Rhodes* are rigorous ones, but when widespread, systemic deprivations of that nature are alleged and properly supported, the state of mind of the responsible officials is not relevant to the ultimate question whether those conditions inflict wanton and unnecessary pain.¹⁵ Rather, judicial consideration of such cases (which typically seek injunctive relief) should focus on objective conditions as experienced by the inmates. The reason for structuring the inquiry in that fashion is straightforward. Prison conditions may conceivably have deteriorated through neglect or as a result of official indifference to prisoners' needs; more likely, the conditions result from the sheer lack of resources and overwhelming demands placed on prison officials, despite the officials' efforts to ensure adequate food, safety, and sanitation for those in their custody. See *Rhodes v. Chapman*, 452 U.S.

¹⁴ Although the Court in *Rhodes* did not explain the meaning of the quoted phrases, it gave some insight into the nature of the conditions that fall below applicable thresholds by its citation, 452 U.S. at 347, of *Hutto v. Finney*, 437 U.S. 678 (1978), in which the district court had characterized the prison conditions under scrutiny as "a dark and evil world completely alien to the free world," *id.* at 681—a statement made readily understandable by the *Hutto* Court's detailed description of those conditions. *Id.* at 681-682. See also *Rhodes v. Chapman*, 452 U.S. at 355 (Brennan, J., concurring), quoting *Pugh v. Locke*, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds, 438 U.S. 781 (1978) (per curiam).

¹⁵ The present case does not involve a complaint growing out of an isolated incident or a transitory condition. Such a case may present considerations more analogous to those involved in *Estelle v. Gamble*, or *Whitley v. Albers*. Moreover, such cases often involve only actions for damages against officials in their individual capacity, thus raising questions of personal accountability and qualified immunity. See p. 7 n.3, *supra*; p. 19 n.16, *infra*.

at 359-360 (Brennan, J., concurring). The conduct and motives of officials may well affect the form of relief that is appropriate upon the finding of a violation. But seriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end. Nor is the concern to avoid judicial second-guessing of particular, discretionary decisions by prison officials as pressing in the context of pervasive, continuing conditions. From the vantage point of those who are punished by such conditions, the failure of the government to meet inmates' basic human needs constitutes cruel and unusual punishment whether or not fault can be clearly ascribed to the particular officials responsible for running the facility.¹⁶

3. An objective test is consistent with the approach marked out in *Rhodes v. Chapman*—the only decision of this Court to address the constitutionality of generalized

¹⁶ Of course, an objective analysis would take into account the purposes asserted by prison officials to justify the establishment of particular conditions. For example, particular housing arrangements may respond to prison security concerns in which prison officials are entitled to a wide range of deference. *Rhodes v. Chapman*, 452 U.S. at 349 n.14. The duration of the conditions, which may relate to their cause, is also a factor. Cf. *Hutto v. Finney*, 437 U.S. 678, 686-687 (1978) ("A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for a week or a month."). An unheated prison during a cold winter may be viewed as inflicting unnecessary pain, but if the problem is a temporary one caused by a broken boiler that officials have endeavored to fix, the situation does not involve the kind of pervasive conditions that can be viewed as an integral part of the penal confinement itself. Courts faced with constitutional challenges to particular conditions of confinement can readily take such considerations carefully into account in resolving such claims.

conditions of prison confinement. Justice Powell's opinion for the Court focused solely on the prison conditions themselves, rather than on the officials' state of mind, in considering whether there was a violation.¹⁷ In emphasizing that the Court was considering "for the first time" the Eighth Amendment limitations "upon the conditions in which a State may confine those convicted of crimes," 452 U.S. at 344-345, *Rhodes* necessarily implied that *Estelle v. Gamble*, and the state of mind requirement applied in that case, did not establish the governing legal standards when general conditions of confinement are challenged.¹⁸

Although some of the more general language in *Whitley v. Albers*, 475 U.S. at 319, appears to contemplate an inquiry into state of mind in the typical Eighth Amendment prison case, that decision did not actually confront allegations of systemically deficient prison conditions of the sort alleged here. Indeed, the Court stressed in *Whitley* that the formulation of Eighth Amendment standards requires careful attention to the "differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U.S. at 320. The Court in *Whitley* suggested that the conduct at issue in that case (action taken to restore prison order), as well as the conduct at issue in *Estelle* (diagnosing and treating a medical condition), did "not purport to be punishment at all." *Id.* at 319.¹⁹ In contrast, the gen-

¹⁷ At the same time, the Court emphasized that, to constitute an Eighth Amendment violation, it is not enough that the conditions of confinement are "restrictive and even harsh"; constitutional limits are exceeded only when the conditions result in deprivation of the "minimal civilized measure of life's necessities." 452 U.S. at 347.

¹⁸ See *Inmates of Occoquan v. Barry*, 844 F.2d 828, 837 (D.C. Cir. 1988) ("The demand for objective facts going to essential human needs is, we believe, the clear message of *Rhodes*.").

¹⁹ Because they were not general conditions cases—but rather challenges to an isolated incident—*Whitley* and *Estelle* appear to have

eral and pervasive conditions of confinement may properly be considered part of the punishment. See *Rhodes*, 452 U.S. at 347. When the challenged conduct does not purport to be punishment, there are sound reasons to inquire into prison officials' state of mind before finding a violation.²⁰ But those reasons do not apply when general prison conditions, which are an integral aspect of the penalty of confinement, are so inhumane so as to result in "unquestioned and serious deprivations of basic human needs." *Rhodes*, 452 U.S. at 347.²¹

implicated only Section 1983 claims for personal liability and damages, where factors other than the objective conditions of confinement would be relevant. See p. 7 n.3, *supra*.

²⁰ The situation in *Estelle*—the denial of adequate medical care—illustrates the point. Government is required to provide medical care to prison inmates, since the incarcerated prisoner has no other options, *DeShaney v. Winnebago County Social Services Dep't*, 489 U.S. 189, 200 (1989); *West v. Atkins*, 487 U.S. 42, 54-55 (1987); *Estelle*, 429 U.S. at 103. But the inherent nature of medical care is such that good faith, or even negligent, mistakes are an inevitable by-product of providing the service in the first place. The risk of medical malpractice is not appreciably different for prison inmates than for other persons. Accordingly, once government has furnished access to medical care, it has satisfied the basic requirements imposed by the Constitution. To require government to furnish error-free medical care as a matter of constitutional law would not only impose an unrealistic standard of care, but would also seek to assure a level of protection that is essentially unrelated to the goal of avoiding cruel and unusual "punishment." Cf. *Davidson v. Cannon*, 474 U.S. 344 (1986) (Due Process Clause is not violated by the negligent failure of prison officials to protect an inmate against an assault by another prisoner).

²¹ See *Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (per curiam) ("Unlike conduct that does not purport to be punishment at all, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement.").

C. If A State Of Mind Inquiry Is Relevant In A Prison Conditions Of Confinement Case, The Appropriate Requirement Is That Of "Deliberate Indifference"

If the Court determines that state of mind is relevant to the question whether an Eighth Amendment violation has occurred, we believe that the deliberate indifference test, properly qualified, strikes the correct balance in this context. The deliberate indifference standard is consistent with the accepted meaning of the adjective "cruel" when used to refer to a person.²² And deprivations affecting basic human needs for shelter, food, and sanitary conditions have in common with the denial of medical care at issue in *Estelle* that in these areas the inmate depends on the prison to provide for his needs, and inadequate performance "may result in pain and suffering which no one suggests would serve any penological purpose." *Estelle*, 429 U.S. at 103.

The deliberate indifference standard, however, "is not self-defining." *Berry v. City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990). As this Court has made clear, the standard requires more than negligence, *Estelle*, 429 U.S. at 105-106, but less than malicious and sadistic intent, *Whitley*, 475 U.S. at 320.²³ We believe the proper focus of the deliberate indifference standard, in the first instance, should be on whether prison officials had knowledge of

²² See J. Murray, *A New English Dictionary on Historical Principles* 1216 (1893) (defining "cruel" to mean "indifferent to or taking pleasure in another's pain or distress" as applied to a person) (dictionary reissued in 1933 as *The Oxford English Dictionary*).

²³ See also *Berry v. City of Muskogee*, 900 F.2d at 1495-1596 (deliberate indifference requires a higher degree of fault than negligence but "remains lower than the intentional and malicious infliction of injury reflected in the *Whitley* standard"); *LaFaut v. Smith*, 834 F.2d at 392 n.5 (an inmate need not prove that prison officials intended to deprive him of medical care).

the conditions that are very likely to offend the Constitution. Actual knowledge of the conditions, coupled with the failure to act (the "deliberate indifference"), would ordinarily satisfy the standard.²⁴

Actual knowledge, however, is not always required. For example, knowledge of prison conditions may properly be inferred if prison officials deliberately shield themselves from such knowledge. Cf. *City of Canton v. Harris*, 109 S. Ct. 1197, 1205 n.10 (1989) (municipality may be liable under 42 U.S.C. 1983 for failure to train only if failure amounts to deliberate indifference to constitutional rights;

²⁴ This position is generally consistent with decision of the lower federal courts. See, e.g., *Berry v. City of Muskogee*, *supra* (an official acts with deliberate indifference if his conduct "disregards a known or obvious risk that is very likely to result in the violation of the prisoners' constitutional rights"); *LaFaut v. Smith*, 834 F.2d at 394 (prison officials acted with deliberate indifference in neglecting the needs of a paraplegic inmate where the evidence established that a prison official "was fully advised both of the inhumane conditions of [the inmate's] confinement and the failure to provide him with the needed therapy" and did nothing for almost eight months); *Cortes-Quinones v. Jimenez-Nettleship*, *supra* (evidence was sufficient to find that prison officials were deliberately indifferent to the needs of a psychiatrically disturbed prisoner in an overcrowded jail since prison officials knew or should have known of the risks of housing a mentally ill prisoner with the general prison population and failed to act); *Morgan v. District of Columbia*, 824 F.2d at 1058 (deliberate indifference requires showing that officials knew or should have known of obvious unreasonable risk of harm and were "outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm"); *Gillespie v. Crawford*, 833 F.2d at 50 (inmates' allegations that they repeatedly complained, without results, about the conditions of their confinement are sufficient to state a claim); *Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) (in an action by an inmate assaulted by a fellow inmate, complaint failed to state a claim because it did not allege that prison officials knew or had reason to know that the other inmate posed a specific risk of harm).

where need to train is "plainly obvious" to officials, failure may be characterized as deliberate indifference). Moreover, if the potential harm from general conditions is so great that prison officials should have known of those conditions and foreseen the harm, the factfinder may infer the requisite knowledge in appropriate cases.²⁵

Nor would the fact that individual prison officials have taken some action in response to a deficient condition preclude a finding of an Eighth Amendment violation. Actions that fall short of remedying demonstrated inhumane conditions may fail to dispel the inference of indifference arising in this context from pervasively inadequate conditions. In such a case, the government officials and institutions responsible for the commitment of resources may have, collectively, exhibited the requisite "deliberate indifference" to the problem at hand by failing to appropriate funds to defray the expense of maintaining adequate conditions; although the individual prison officials may not have made those judgments, they are appropriately called upon to answer for them when sued in their official capacity.²⁶

²⁵ Some courts have equated deliberate indifference with recklessness. See, e.g., *Duckworth v. Franzen*, 780 F.2d 645, 652-653 (7th Cir. 1985) (equating deliberate indifference with criminal recklessness, which implies "an act so dangerous that the defendant's knowledge of the risk can be inferred"), cert. denied, 479 U.S. 816 (1986). But see *Berry v. City of Muskogee*, 900 F.2d at 1495-1496 & n.9 (stating that deliberate indifference standard is not as high as criminal recklessness, and noting that the Supreme Court has never ruled on the precise relationship among gross negligence, deliberate indifference, and recklessness in the Eighth Amendment context). This Court has suggested in a different context that deliberate indifference requires proof of more culpable conduct than gross negligence. *City of Canton v. Harris*, 109 S. Ct. 1197, 1204 n.7 (1989) (Section 1983 action alleging a city's failure to train).

²⁶ With respect to the officials' liability in damages when sued in their personal capacity, see p. 7 n.3, *supra*.

The approach suggested in text comports with the recognition that

A deliberate indifference standard permits the necessary deference to prison officials' judgments about security and other important penological concerns. This Court has noted that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible to easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Moreover, the Court has recognized that judicial deference is warranted "because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* at 548. See also *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (courts should not "substitute [their] judgment * * * on difficult and sensitive matters of institutional administration * * * for the determinations of those charged with the formidable task of running a prison"); *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974) ("[T]he problems of prisons * * * are not readily susceptible of resolution by decree. * * * [W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities."); *Rhodes v. Chapman*, 452 U.S. at 351 & n.16

prison management is "peculiarly within the province of the legislative and executive branches of government" because the resolution of prison problems "requires expertise, comprehensive planning, and the commitment of resources." *Procunier v. Martinez*, 416 U.S. 396, 404-404 (1974) (emphasis added). See also *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 245 (1983) ("If, of course, the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay."; construing Due Process Clause).

(addressing magnitude of the problems of prison administration).²⁷

* * * * *

The court of appeals incorrectly applied the heightened malicious and sadistic intent standard to the claim here that the systemic and pervasive conditions of confinement violate the Eighth Amendment. Accordingly, the judgment should be vacated and the case remanded for further consideration under the proper standard. See *Graham v. Connor*, 109 S. Ct. 1865, 1873 (1989); *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2801-2802 (1990).

²⁷ If the deliberate indifference standard is applied as we suggest, it is unlikely that the more serious prison conditions cases (such as those cited in p. 18 n.14, *supra*), would come out differently under such a standard than under our preferred approach, which dispenses with an inquiry into state of mind. Nevertheless, we believe it analytically sounder in systemic challenges for the courts to look to the nature of the conditions themselves, rather than to conduct a distracting and often inconclusive inquiry into intent.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

DAVID K. FLYNN
THOMAS E. CHANDLER
Attorneys

NOVEMBER 1990

No. 89-7376

10

Supreme Court, U.S.
FILED
NOV 13 1990
F. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

PEARLY WILSON,

Petitioner,

—vs.—

RICHARD SEITER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF OF THE AMERICAN PUBLIC
HEALTH ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

JOHN BOSTON, ESQ.
(Counsel of Record)
15 Park Row—7th Floor
New York, New York 10038
(212) 577-3530

518p

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 89-7376

PEARLY WILSON,

Petitioner,

vs.

RICHARD SELTER, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE

The American Public Health Association ("APHA") moves pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief amicus curiae in support of petitioner. The written consents of petitioner and of respondent have been filed with the Court.

APHA is a national non-governmental

organization established in 1872 for the purpose of improving public health and the quality of health care. Together with its affiliated associations, APHA is the largest public health association in the world, with a combined multidisciplinary membership of approximately 50,000 health care professionals and consumers. APHA has appeared before this Court on numerous occasions as amicus curiae in cases with serious implications for the public health. See, e.g., West v. Atkins, 487 U.S. 40 (1988); Hardwick v. Bowers, 478 U.S. 186 (1986); Roe v. Wade, 410 U.S. 113 (1973).

APHA has a special interest in assuring adequate health care and healthful living conditions for underserved segments of society, including prisoners. In the early 1970's, APHA appointed a task force to devise a set of standards--the first of

its kind--for the delivery and maintenance of health care in correctional facilities. See Standards for Health Services in Correctional Institutions (1976). A second, revised edition of the standards was issued a decade later. See Standards for Health Services in Correctional Institutions (1986).¹

Both editions of these standards contained extensive chapters on environmental conditions because the APHA is committed to the public health view that acceptable living conditions are as important to health as are effective medical services. The current standards' chapter "Environmental Health" directly addresses such matters as temperature control, space requirements, noise, sanitation, food

¹ The 1986 standards are herewith lodged with the Clerk of Court.

service, and vermin control--the same issues involved in this case. Id. at 61-89.

Because of its professional expertise and multi-disciplinary focus in addressing health problems in prison, APHA believes it will present to the Court a valuable perspective on the issues concerning prison conditions litigation that this case presents. Consistent with its purpose of advancing the public health and in the hope of decreasing the human suffering caused by health-threatening prison conditions, APHA requests leave to file this brief.

Respectfully submitted,

/s/ _____
John Boston

Dated: November 12, 1990
New York, New York

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF <u>AMICUS CURIAE</u>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
THE EIGHTH AMENDMENT ANALYSIS ADOPTED BY THE COURT OF APPEALS MISAPPLIES THIS COURT'S PRECEDENTS AND UNDERMINES THE JUDICIARY'S ABILITY TO ENSURE MINIMAL STANDARDS OF DECENCY IN CONDITIONS OF PRISON CONFINEMENT	
A. The court below misapplied this Court's decision in Whitley v. Albers and ignored the governing standard of Rhodes v. Chapman	8
B. The Eighth Amendment analysis applied by the court of appeals would place the most inhumane prison condi- tions beyond the federal courts' injunctive powers.....	14
CONCLUSION	38

TABLE OF AUTHORITIES

Cases:

Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986).....	34
Allee v. Medrano, 416 U.S. 802 (1974)..	29
Balla v. Idaho State Board of Corrections, 595 F.Supp. 1558 (D.Idaho 1984)..	30
Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986).....	20, 33
Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977).....	19
City of Mesquite v. Aladdin's Castle, 455 U.S. 283 (1982).....	29
Coniglio v. Thomas, 756 F.Supp. 409 (S.D.N.Y. 1987).....	32
Davenport v. DeRobertis, 844 F.2d 1310 (7th Cir. 1988), <u>cert. denied sub nom. Lane v. Davenport</u> , 109 S.Ct. 260 (1988).....	30
Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986).....	31, 32
DeGidio v. Pung, 704 F.Supp. 922 (D.Minn. 1989).....	30
Duran v. Anaya, 642 F.Supp. 510 (D.N.M. 1986).....	35
Fambro v. Fulton County, 713 F.Supp. 1426 (N.D.Ga. 1989).....	34

Finney v. Mabry, 546 F.Supp. 628 (E.D.Ark. 1982).....	34
Fisher v. Koehler, 692 F.Supp. 1519 (S.D.N.Y. 1988), <u>aff'd</u> , 902 F.2d 2 (2d Cir. 1990).....	23, 27, 29, 30
French v. Owens, 777 F.2d 1250 (7th Cir. 1985), <u>cert. denied</u> , 479 U.S. 817 (1986).....	6
Gates v. Collier, 548 F.2d 1241 (5th Cir. 1977).....	18, 33
Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).....	16
Gates v. Collier, 349 F.Supp. 881 (N.D.Miss. 1972), <u>aff'd</u> , 501 F.2d 1291 (5th Cir. 1974).....	14, 15, 16
Gates v. Collier, 390 F.Supp. 482 (N.D.Miss. 1975), <u>affirmed on other grounds</u> , 525 F.2d 965 (5th Cir. 1976), <u>affirmed and remanded with directions</u> , 548 F.2d 1241 (5th Cir. 1977).....	17
Gates v. Collier, 423 F.Supp. 732 (N.D.Miss. 1976).....	18
Gilland v. Owens, 718 F.Supp. 665 (W.D.Tenn. 1989).....	27, 34
Gregg v. Georgia, 428 U.S. 153 (1976)..	10
Grubbs v. Bradley, 552 F.Supp. 1032 (M.D.Tenn. 1982).....	24
Hoptowit v. Ray, 682 F.Supp. 1237 (9th Cir. 1982).....	31, 32

Inmates of Occoquan v. Barry, 717 F.Supp.
854 (D.D.C. 1989)..... 29, 34

Inmates of the Allegheny County Jail v.
Wecht, 901 F.2d 1191 (3d Cir. 1990)
..... 25

Inmates of the Allegheny County Jail v.
Wecht, 699 F.Supp. 1137 (W.D.Pa.
1988), aff'd, 874 F.2d 147 (3d
Cir.), vacated and remanded, 110
S.Ct. 355 (1989), vacated as moot,
893 F.2d 147 (3d Cir. 1990)..... 25

Inmates of the Allegheny County Jail v.
Wecht, 565 F.Supp. 1278 (W.D.Pa.
1983)..... 25

Johnson v. Levine, 450 F.Supp. 648, 655
(D.Md. 1978), aff'd in pertinent
part, 588 F.2d 1378 (4th Cir. 1978)
(per curiam)..... 23

Laaman v. Helgemoe, 437 F.Supp. 269
(D.N.H. 1977)..... 12

LaMarca v. Turner, 662 F.Supp. 647
(S.D.Fla. 1987), appeal dismissed,
861 F.2d 724 (11th Cir. 1988).... 28

LaReau v. Manson, 651 F.2d 96 (2d Cir.
1981)..... 6

Lovell v. Brennan, 728 F.2d 560 (1st Cir.
1984)..... 30

Miles v. Bell, 621 F.Supp. 51 (D.Conn.
1985)..... 32

Morales Feliciano v. Hernandez Colon, 697
F.Supp. 37 (D.P.R. 1988)..... 34

Morales Feliciano v. Romero Barcelo, 672
F.Supp. 591 (D.P.R. 1986)..... 24

Morrow v. Harwell, 768 F.2d 619 (5th Cir.
1985)..... 30

Newman v. Alabama, 559 F.2d 283 (5th
Cir.), cert. denied sub nom. Alabama
v. Pugh, 438 U.S. 915 (1978)..... 32

Palmigiano v. DiPrete, 737 F.Supp. 1257
(D.R.I. 1990)..... 36

Palmigiano v. Garrahy, 443 F.Supp. 956
(D.R.I. 1977)..... 24

Palmigiano v. Garrahy, C.A. No. 74-172,
Order (D.R.I., January 25, 1984). 35

Pugh v. Locke, 406 F.Supp. 318 (N.D.Ala.
1976), aff'd in part and remanded,
Newman v. Alabama, 559 F.2d 283 (5th
Cir.), cert. denied sub nom. Alabama
v. Pugh, 438 U.S. 915 (1978)
..... 26, 32, 37

Ramos v. Lamm, 639 F.2d 559 (10th Cir.
1980), cert. denied, 450 U.S. 1041
(1981)..... 6, 32

Ramos v. Lamm, 485 F.Supp. 168 (D.Colo.
1979), aff'd in part and vacated and
remanded in part on other grounds,
639 F.2d 559 (10th Cir. 1980), cert.
denied, 450 U.S. 1041 (1981)
..... 23, 28, 32

Reece v. Gragg, 650 F.Supp. 1297 (D.Kan.
1986)..... 29

Rhodes v. Chapman, 452 U.S. 337 (1981)	2, 9, 10, 11, 12, 14, 25, 31, 32, 37
Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), <u>cert. denied</u> , 460 U.S. 1042 (1983)	32
Ruiz v. Estelle, 503 F.Supp. 1265 (S.D.Tex. 1980), <u>aff'd in part and modified in part on other grounds</u> , 679 F.2d 1115 (5th Cir. 1982), <u>cert. denied</u> , 460 U.S. 1042 (1983)	26, 37
Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977)	6
Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990)	6, 20, 21
Tillery v. Owens, 719 F.Supp. 1256 (W.D.Pa. 1989), <u>aff'd</u> , 907 F.2d 418 (3d Cir. 1990)	20, 21, 22, 23, 32, 33
Todaro v. Ward, 431 F.Supp. 1129 (S.D.N.Y.), <u>aff'd</u> , 565 F.2d 48 (2d Cir. 1977)	23
Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), <u>cert. denied</u> , 481 U.S. 1069 (1987)	32
Toussaint v. McCarthy, 597 F.Supp. 1388 (N.D.Cal. 1984), <u>aff'd in part and rev'd in part on other grounds</u> , 301 F.2d 1080 (9th Cir. 1986), <u>cert. denied</u> , 481 U.S. 1069 (1987)	6
Turner v. Safley, 482 U.S. 78 (1987)	32

United States v. Oregon State Medical Society, 343 U.S. 326 (1952)	28
U.S. v. W.T. Grant Co., 345 U.S. 629 (1953)	29
Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983), <u>cert. denied</u> , 468 U.S. 1217 (1984)	22
Whitley v. Albers, 475 U.S. 312 (1986)	2, 8, 13, 22
Wooden v. Norris, 637 F.Supp. 543 (M.D.Tenn. 1986)	32
Constitutional Provisions:	
U.S. Const., Amend. VIII 2, 3, 5 <u>et passim</u>	
Federal Statutes, Regulations, and Rules:	
U.S. Supreme Court Rule 36.3	1
Books, Journals and Other Authorities	
Austin and McVey, The 1989 NCCD Prison Population Forecast: The Impact of the War on Drugs, NCCD Focus (Decem- ber 1989)	35
Harris and Spiller, <u>After Decision</u> (1976)	25
Martin and Ekland-Olson, <u>Texas Prisons: The Walls Came Tumbling Down</u> (1987)	37

Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv.L.Rev. 626, 641 (1981)..... 28

Status Report: The Courts and Prisons (January 1, 1990), in 2 Prisoners and the Law (Robbins ed. 1990) 33, 36

U.S. Dept. of Justice, Prison Population Grows 6 Percent During First Half of Year (October 7, 1990).....35

Yackle, Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System (1980).....37

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 89-7376

PEARLY WILSON,

Petitioner,

vs.

RICHARD SEITER, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INTEREST OF AMICUS CURIAE
AMERICAN PUBLIC HEALTH ASSOCIATION

The interests of the American Public Health Association (APHA) are set forth in its motion for leave to file this brief as amicus curiae, which is bound herewith pursuant to Rule 36.3 of the Rules of this Court.

SUMMARY OF ARGUMENT

A claim that conditions of prison confinement constitute cruel and unusual punishment must be decided based on actual conditions in the prison. The standard of malicious and sadistic intent, applied by Whitley v. Albers, 475 U.S. 312 (1986), to certain kinds of constitutional torts by prison officials, is not applicable or helpful where the issue is continuing conditions of confinement and not a discrete incident or an emergency response. The proper standard is that stated in Rhodes v. Chapman, 452 U.S. 337 (1981): conditions are cruel and unusual if "they result[] in unquestioned and serious deprivations of basic human needs" or "deprive inmates of the minimal civilized measure of life's necessities." Id. at 347. This objective test is compelled by

the realities of prison life, in which foul and inhumane conditions are rarely imposed for evil motives, but more frequently arise from lack of resources or facilities, incompetence, or disorganization.

The existence of reform efforts by prison officials cannot be dispositive of the existence of an Eighth Amendment violation. Prison officials almost always make improvements when they are sued, but these changes are not always fully implemented, and do not always eliminate the constitutional violations when they are carried out. The significance of these improvements should be assessed by the district court as part of its remedial discretion. If the constitutional violation has been entirely eliminated, the court may withhold injunctive relief. If the violation remains, in whole or in

part, the extent and nature of changes made by the defendants should be considered in formulating injunctive relief. But the touchstone must always be the actual conditions in the prison and their effect on those imprisoned.

ARGUMENT

THE EIGHTH AMENDMENT ANALYSIS ADOPTED BY THE COURT OF APPEALS MISAPPLIES THIS COURT'S PRECEDENTS AND UNDERMINES THE JUDICIARY'S ABILITY TO ENSURE MINIMAL STANDARDS OF DECENCY IN CONDITIONS OF PRISON CONFINEMENT.

This case poses the question whether the Eighth Amendment requires that the lawfulness of prison living conditions be measured by the good intentions of prison officials or by actual conditions in the prison.

The prisoner-plaintiffs alleged conditions that have previously been acknowledged to violate the Eighth Amendment if proven to be sufficiently severe: unsanitary eating conditions, inadequate heating, housing of physically and mentally ill prisoners in general population dormitories, inadequate ventilation, excessive noise, and vermin infestation.¹

Prison officials responded that they had made "affirmative efforts to maintain habitable conditions" such as servicing heaters, providing extra blankets, installing exhaust fans, and hiring an exterminator. A. 72. The actual effects

¹ See, e.g., Tillery v. Owens, 907 F.2d 418, 422-24 (3d Cir. 1990) (inadequate ventilation, insect infestation); French v. Owens, 777 F.2d 1250 (7th Cir. 1985), cert. denied, 479 U.S. 817 (1986) (unsanitary eating conditions, inadequate ventilation); LaReau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (failure to screen inmates for communicable diseases); Ramos v. Lamm, 639 F.2d 559, 570-72 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (unclean food, inadequate heating and ventilation, insect infestation); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) (failure to segregate inmates with communicable diseases); Toussaint v. McCarthy, 597 F.Supp. 1388, 1395-96, 1409-12 (N.D.Cal. 1981), aff'd in part and rev'd in part on other grounds, 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) (lack of food sanitation, inadequate heating and ventilation, excessive noise).

of their efforts remain disputed.² The court of appeals observed:

Importantly, the appellants do not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions. Rather, appellants' complaints are aimed at the results of those efforts. . . . The appellants' position, apparently, is that despite these actions, prison conditions remain unacceptable.

A. 73.

The court did not purport to resolve the disputed factual question of what the prison conditions actually were. Instead, it held that there was no indication that the prison officials "used confinement conditions to punish" the prisoners, and that there was no evidence of "behavior marked by persistent malicious cruelty." Hence, it held that there was no genuine issue of material fact, and the prison

² The factual disputes are set out in the brief of Petitioner herein.

officials were entitled to summary judgment. A. 73-74.

A. The court below misapplied this Court's decision in Whitley v. Albers and ignored the governing standard of Rhodes v. Chapman.

The appeals court relied on this Court's decision in Whitley v. Albers, 475 U.S. 312 (1986), which held that damages could not be recovered for the use of force in quelling a prison disturbance unless prison personnel acted "maliciously and sadistically for the very purpose of causing harm." Id. at 320-21.

This case is not governed by Whitley v. Albers. Whitley was a constitutional tort case arising from a single discrete incident requiring split-second decisions and action by prison officials. The Whitley plaintiff's interest in avoiding forcible injury had to be balanced against prison officials' strong interest in

quickly ending the disturbance and the threats it posed to other inmates and staff. The Court therefore concluded that the "deliberate indifference" standard advocated by the plaintiff and used in prison medical care cases did not "adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Id. at 320. Hence a showing of malicious and sadistic intent was required.

This case is more like Rhodes v. Chapman, 452 U.S. 337 (1981), because it involves continuing, "conditions of confinement." Id. at 345.³ The Rhodes

³ This phrase, the word "conditions," and variations of them are used repeatedly throughout the Rhodes opinion.

plaintiffs alleged persistently overcrowded conditions resulting in double-celling in an Ohio penitentiary. The Court noted that the core of modern Eighth Amendment jurisprudence is the ban on punishments that "'involve the unnecessary and wanton infliction of pain,'" including those that are "totally without penological justification."⁴ It concluded that conditions are cruel and unusual if "they result[] in unquestioned and serious deprivations of basic human needs" or "deprive inmates of the minimal civilized measure of life's necessities." Id. at 347 (emphasis supplied).

The Rhodes standard speaks to conditions in the prisons and not in the minds of prison officials. So did its analysis

⁴ Id. at 346, quoting Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976).

of the plaintiffs' challenge to double-celling. The Court stated:

Virtually every one of the [district] court's findings tends to refute [the prisoners'] claim. The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement. . . . Although job and educational opportunities diminished marginally as a result of double celling, limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain. . . .

Id. at 347-48 (emphasis in original).⁵

⁵ The Court also was unconvinced by the district court's reliance on factors like the length of the prisoners' sentences, the degree to which the prison's population exceeded its "design capacity," the large amount of time spent in-cell, and the fact that double-celling was not a temporary condition. Id. at 348. But the focus remained on the facts of prison life and not the prison officials' mental state.

Conspicuous by its absence from Rhodes is any discussion of prison officials' state of mind. The focus is on the actual conditions of confinement and their effect on the people who live under them.⁶ And there is no discussion in Rhodes of whether prison officials "used confinement to punish" the prisoners. A. 73. Rather, the Court held that basic Eighth Amendment principles apply "when the conditions of confinement compose the punishment at issue." Rhodes, 452 U.S. at 347 (emphasis supplied).

Nothing in Whitley purports to over-

⁶ "The first aspect of judicial decision-making in this area is scrutiny of the actual conditions under challenge. . . . In determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the 'touchstone is the effect upon the imprisoned.'" Rhodes, 452 U.S. at 362, 364 (Brennan, J., concurring), quoting Laaman v. Helgemoe, 437 F.Supp. 269, 323 (D.N.H. 1977).

rule or modify Rhodes. Rather, Whitley deals with an entirely different problem for which the analysis of Rhodes simply is not helpful.⁷ Nor is the Whitley analysis helpful in addressing the Rhodes overcrowding issue or the conditions presented in this case--conditions that are ongoing, that do not arise from short-term exigencies, that do not require rapid decision-making, and that are not justified by any substantial countervailing penological interest.⁸

⁷ In Whitley, four Justices dissented. Significantly, the dissent does not criticize the majority for departing from Rhodes; indeed, it does not mention Rhodes at all. The Whitley majority cited Rhodes only in support of the most general propositions of Eighth Amendment jurisprudence. Whitley, 475 U.S. at 319, 321. Taken together, these opinions show convincingly that no Justice viewed Whitley as limiting, qualifying, or indeed having much to do with what had been decided in Rhodes.

⁸ The respondent prison officials herein did not assert any legitimate penological interest in unhealthy food, lack of heat,

B. The Eighth Amendment analysis applied by the court of appeals would place the most inhumane prison conditions beyond the federal courts' injunctive powers.

The Sixth Circuit's misapplication of Whitley v. Albers would effectively immunize even the worst prison conditions from federal judicial correction. A few examples will show how.

In Gates v. Collier, 349 F.Supp. 881 (N.D.Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974),⁹ the district court condemned the confinement of prisoners in "barracks unfit for human habitation and in conditions that threaten their physical

(footnote cont'd)

the spread of communicable disease, excessive noise, and infestation with insects.

⁹ Gates is one of several Eighth Amendment prison conditions cases cited with approval in Rhodes. See 452 U.S. at 352 n. 17.

health and safety, by reason of gross deficiencies in plant and equipment and lack of adequate medical staff and facilities. . . ." Defendants had "failed to provide adequate protection against physical assaults, abuses, indignities and cruelties of other inmates," by giving authority and weapons to "trusty" inmates and by failing to separate serious violent offenders from nonviolent or first offenders. 349 F.Supp. at 888-89, 894.

The court noted that the state legislature had authorized and directed the penitentiary board to prepare a plan directed at improving inmates' security and eliminating the trusty system. A consultant committee engaged jointly by state officials, the federal Law Enforcement Assistance Administration (LEAA), and the American Correctional Association had made recommendations for one million dollars in

emergency reform steps, and LEAA had committed itself to provide the funds. The Governor assured the court during pre-trial conferences that he would "strongly advocate to the Mississippi Legislature that it provide adequate legislation and funds not only to eliminate the undesirable conditions at Parchman but to make it an exemplary penal institution." Id. 891-92. Nonetheless, the court entered judgment finding an Eighth Amendment violation, and the court of appeals affirmed, observing: "While recognizing that steps have been taken, since the filing of this suit, to improve conditions at Parchman, it is evident that much is left to be done before Parchman is operated in accord with [] constitutional requirements. . . ." 501 F.2d at 1321.

Under the approach of the Sixth Circuit in this case, the Mississippi dis-

trict court would have been required to dismiss Gates. It made no findings that the conditions had been imposed because of the defendants' malicious or sadistic motivations. And the Gates plaintiffs, like the present petitioner, did "not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions." A. 73. In fact, they had made substantial efforts; but the key fact, as stated by the court of appeals, was that "much is left to be done."¹⁰ The Gates court,

¹⁰ Just how much was left is made clear by the district court's subsequent opinion, issued three years after its initial injunction, finding a continuing Eighth Amendment violation in defendants' "continuing failure to provide for the physical health and well being of inmates" by their noncompliance with medical care requirements, the "appalling, deplorable condition" of many housing units, and the continued overcrowding. Gates v. Collier, 390 F.Supp. 482, 488-89 (N.D.Miss. 1975), affirmed on other grounds, 525 F.2d 965 (5th Cir. 1976), affirmed and remanded with directions, 548 F.2d 1241 (5th Cir.

unlike the court below, recognized that "the results of these efforts," A. 73, were of prime importance.¹¹

Similarly, in Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977), the district court condemned housing units with "severe environmental and fire hazards"; crowding so extreme that prisoners were forced to sleep in garages, barber shops, libraries and stairwells, and held in dormitories without toilet and shower facilities; overtaxed kitchen, water and sewer systems; and dining facilities pre-

(footnote cont'd)

1977); see also Gates v. Collier, 423 F.Supp. 732 (N.D.Miss. 1976) (granting further relief with respect to crowding and the closing of dilapidated camps).

¹¹ Ultimately, it appears, those results were acceptable. The last reported opinion on the merits of the Gates litigation was in 1977. Gates v. Collier, 548 F.2d 1241 (5th Cir. 1977).

senting "immediate health dangers."

This case, too, would have been dismissed under the Sixth Circuit's approach in this case. There were no findings of malicious or sadistic intent on defendants' part. To the contrary, the court of appeals was constrained to hold that "the good will shown by the Defendants cannot serve as a defense." Id. at 396. Nor could plaintiffs claim that defendants had made "no efforts" to improve conditions; the state prison budget had been increased fivefold in three years and the defendants had submitted a comprehensive reform plan approved by all parties. Yet the court of appeals upheld the district court's finding "that the presently existing overcrowding . . ., when considered with other circumstances, constitutes cruel and unusual punishment. . . ." Id. at 400 (emphasis in original). Like the present

petitioner, the Battle plaintiffs argued that "despite [defendants'] actions, prison conditions remain unacceptable," A. 73, and the court of appeals properly affirmed on that basis.¹²

More recently, a Pennsylvania district court condemned the State Correctional Institution at Pittsburgh as an "overcrowded, unsanitary, and understaffed firetrap." Tillery v. Owens, 719 F.Supp. 1256, 1259 (W.D.Pa. 1989), aff'd, 907 F.2d 418 (3d Cir. 1990). The appellate court agreed that "almost every element of the physical plant and provision of services at SCIP falls below constitutional norms." 907 F.2d at 427. Indeed, conditions

¹² In 1986, the court of appeals affirmed the district court's findings that conditions of confinement met Eighth Amendment standards; the action was dismissed except for claims concerning racial discrimination. Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986).

appear fully as bad as in Mississippi in 1972. The risk of assault was so great that many inmates feared to leave their cells for recreation or to enter the shower area; inmate housing was infested with vermin and festooned with bird droppings; ventilation was grossly inadequate; defective plumbing resulted in leaks, puddles and odors, and showers were encrusted with dirt and slime; the danger of fire was enormous and preparation for it virtually nonexistent; and medical and psychiatric treatment were "shockingly deficient," with the psychiatric care area "in shambles." 907 F.2d at 422-24. The psychiatric observation area, in which inmates were "abandon[ed] . . . to vegetate and fester in despicable confinement," emitted such an "overpowering stench" that the district judge did not get close enough to see it. 719 F.Supp.

at 1304.

Under the court of appeals' approach in this case, no Eighth Amendment violation could have been found. The district court's lengthy opinion contains no findings of malice or sadism on the part of any defendant; indeed, at one point, it "hasten[ed] to add that we do not question the integrity of the officials at SCIP. They are merely jerry-rigging with a severe staff and supply shortage owing to budget constraints." 719 F.Supp. at 1276. Although there are numerous references to deliberate indifference, that is precisely the showing that Whitley, relied on by the court below, held inadequate to establish an Eighth Amendment violation. 475 U.S. at 320.

The foregoing cases¹³ illustrate two

¹³ The list could be extended at length. See, e.g., Wellman v. Faulkner, 715 F.2d 269, 273 (7th Cir. 1983), cert. denied,

central points.

First, the focus on prison officials'

(footnote cont'd)

468 U.S. 1217 (1984) ("Despite the apparent good intentions of prison officials, there seems no foreseeable cure for this serious systemic deficiency" of lack of medical staff); Fisher v. Koehler, 692 F.Supp. 1519, 1562, 1566-68 (S.D.N.Y. 1988), aff'd, 902 F.2d 2 (2d Cir. 1990) (citing "obvious sincerity and competence" of Commissioner and Warden while finding "systematic deficiencies" in failure to control violence); Ramos v. Lamm, 485 F.Supp. 122, 168 (D.Colo. 1979), aff'd in part and vacated and remanded in part on other grounds, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (defendants had spent "significant sums" to build new prisons; their failure to remedy intolerable conditions represented a "utilitarian calculus to obtain maximum results from limited resources"; no malice found); Johnson v. Levine, 450 F.Supp. 648, 655 (D.Md. 1978), aff'd in pertinent part, 588 F.2d 1378 (4th Cir. 1978) (per curiam) (officials had "conscientiously attempted" to improve facilities with physical improvements and new programs and services); Todaro v. Ward, 431 F.Supp. 1129, 1160 (S.D.N.Y.), aff'd, 565 F.2d 48 (2d Cir. 1977) (medical staff appeared "truly concerned with [inmates'] well-being," but the medical care system was constitutionally deficient).

state of mind misses the point. Filthy food, flies and cockroaches, and exposure to disease rarely result from the warden's malicious and sadistic propensities. More often, such conditions result from disorganization, incompetence,¹⁴ or fiscal or political difficulties,¹⁵ usually stemming

¹⁴ See, e.g., Morales Feliciano v. Romero Barcelo, 672 F.Supp. 591, 605, 607, 613-14, 619, 620-21 (D.P.R. 1986) (repeated references to chaos, disorganization and incompetence in numerous aspects of prison administration); Palmigiano v. Garrahy, 443 F.Supp. 956, 977 (D.R.I. 1977) ("complete absence of effective leadership or management capability on the part of the responsible officials").

¹⁵ For an extreme example, see Grubbs v. Bradley, 552 F.Supp. 1032, 1082 (M.D.Tenn. 1982) (licensed practical nurse directed to perform surgery on a hemorrhaging prisoner because the year's hospital budget was exhausted).

In a more typical case, the district judge observed:

We take judicial notice of the fact that for years Allegheny County officials have proposed, rejected, discussed and haggled over new jail facilities; plans for new buildings have been drawn up; proposals for renovating already existing facilities

at least in part from "[p]ublic apathy and the political powerlessness of inmates."¹⁶

(footnote cont'd)

have been made and rejected; other plans have been delayed in the hope that outside financial sources of assistance will be uncovered. As a result, the jail remains with us--old, dilapidated, and unconstitutionally overcrowded. An economic motive can no longer excuse or be used to justify the conditions imposed on the inmates at ACJ.

Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1296-97 (W.D.Pa. 1983),

Five years later little had changed. The district court concluded that constitutional conditions of confinement could not be provided in the old jail. Inmates of the Allegheny County Jail v. Wecht, 699 F.Supp. 1137 (W.D.Pa. 1988), aff'd, 874 F.2d 147 (3d Cir.), vacated and remanded on other grounds, 110 S.Ct. 355 (1989), vacated as moot, 893 F.2d 147 (3d Cir. 1990). A few months ago the court of appeals upheld coercive sanctions for continued violation of crowding limits, citing the county's "consistent failure to meet its meager Eighth Amendment obligations." Inmates of the Allegheny County Jail v. Wecht, 901 F.2d 1191, 1200 (3d Cir. 1990).

¹⁶ Rhodes, 452 U.S. at 358 (Brennan, J., concurring). Accord, Harris and Spiller,

Even overtly vicious conduct by lower-level staff may ultimately find its roots in neglect or ineptitude, rather than malice, on the part of responsible officials.¹⁷

Thus, in prisons, all that is necessary for the triumph of evil is that good

(footnote cont'd)

After Decision at 5-8 (1976) (noting lack of support for prison reform until publicized via litigation).

¹⁷ Thus, widespread brutality by Texas prison staff, as well as tolerance of the exploitative "building tender" trusty system, were closely related to state officials' failure to provide enough security staff to keep order in a humane fashion. Ruiz v. Estelle, 503 F.Supp. 1265, 1299, 1303 (S.D.Tex. 1980), aff'd in part and modified in part on other grounds, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). Judge Johnson made similar observations about the inmate trusty system in Alabama. Pugh v. Locke, 406 F.Supp. 318, 325 (N.D.Ala. 1976), aff'd in part and remanded, Newman v. Alabama, 559 F.2d 283, 291 (5th Cir.), cert. denied sub nom. Alabama v. Pugh, 438 U.S. 915 (1978).

men and women have other priorities. Consequently, an Eighth Amendment analysis that turns on the ill will of prison functionaries simply misunderstands the problem and will be wholly ineffectual in guaranteeing minimal standards of decency.

Second, the court of appeals' apparent view that if prison officials take any action, however ineffectual, to improve conditions, no violation can be found,¹⁸ would effectively abolish Eighth Amendment injunctive jurisprudence. Prison officials almost always do something when confronted with litigation; it would be astonishing if they did not.¹⁹

¹⁸ In the court's own words: "Importantly, the appellants do not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions. Rather, appellants' complaints are aimed at the results of those efforts." A. 73.

¹⁹ See, e.g., Gilland v. Owens, 718 F.Supp. 665, 689-90 (W.D.Tenn. 1989); Fisher v. Koehler, 692 F.Supp. at 1565-67

And as one commentator put it, "a prison is most in need of systemic reform when pervasive violations persist despite good faith efforts of reasonable individuals."²⁰

This Court has sagely warned, "It is the duty of courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952);

(footnote cont'd)

("a case of better late than never"); LaMarca v. Turner, 662 F.Supp. 647, 716 (S.D.Fla. 1987), appeal dismissed, 861 F.2d 724 (11th Cir. 1988); Ramos v. Lamm, 485 F.Supp. at 178 ("commendable" improvements begun during litigation); and cases discussed at 14-23, above.

²⁰ Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv.L.Rev. 626, 641 (1981).

see also City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289 (1982); Allee v. Medrano, 416 U.S. 802, 810-11 (1974); U.S. v. W.T. Grant Co., 345 U.S. 629 (1953) (reforms undertaken under threat of litigation do not moot injunctive claims). The law books are replete with accounts of internal reform efforts that either were not adequate or were not completed.²¹ If the mere existence of some reform effort is enough to defeat an Eighth Amendment claim, then prison conditions jurisprudence is at an end.

This is not to say that district courts should ignore prison officials' constructive efforts. In some cases,

²¹ See, e.g., Inmates of Occoquan v. Barry, 717 F.Supp. 854, 865-66 (D.D.C. 1989); Fisher v. Koehler, 692 F.Supp. at 1564-68; Reece v. Gragg, 650 F.Supp. 1297, 1299 (D.Kan. 1986) (court tour showed severe problems remained despite substantial improvements).

these efforts may be sufficient to eliminate the Eighth Amendment violation by the time of trial, obviating the need for injunctive relief.²² In others, they may affect the scope and nature of the injunctive relief granted.²³ Certainly, where prison officials adopt or propose

²² See, e.g., Lovell v. Brennan, 728 F.2d 560 (1st Cir. 1984) (relief denied where Eighth Amendment violations had been eliminated by time of trial); DeGidio v. Pung, 704 F.Supp. 922 (D.Minn. 1989) (same).

²³ Davenport v. DeRobertis, 844 F.2d 1310, 1314 (7th Cir. 1988), cert. denied sub nom. Lane v. Davenport, 109 S.Ct. 260 (1988) (injunctive relief must be tailored to improved circumstances); Morrow v. Harwell, 768 F.2d 619, 627 (5th Cir. 1985) (where officials have shown their readiness to meet constitutional requirements by changing policies, initial response should be limited to declaratory relief); Fisher v. Koehler, 692 F.Supp. at 1566-67; Balla v. Idaho State Board of Corrections, 595 F.Supp. 1558, 1578-80 (D.Idaho 1984) (relief regarding personal security limited to those housing units where defendants' remedial efforts had not solved the problem).

substantial reforms, the court should use them as the basis of its remedy unless they are shown to be plainly inadequate to end the constitutional violation.²⁴ But in all such cases, these are matters of the courts' remedial discretion; they do not negate the existence of an Eighth Amendment violation.

For the past two decades the federal courts have been the primary force in maintaining minimal standards of decency in prisons. "... [J]udicial intervention has been responsible, not only for remedying some of the worst abuses by direct order, but also for 'forcing the legislative branch of government to reevaluate correction policies and to appropriate funds for upgrading penal

²⁴ See Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986); Hoptowit v. Ray, 682 F.Supp. 1237, 1247 (9th Cir. 1982).

systems.'"²⁵ At the same time, judicial intervention under the Eighth Amendment has been kept within proper bounds by the decisions of this Court²⁶ and of the courts of appeals,²⁷ as well as by the often-expressed reluctance of district courts to become more involved in prison operations than constitutional standards require.²⁸

²⁵ Rhodes, 452 U.S. at 359-60 (Brennan, J., concurring) (citation omitted).

²⁶ Rhodes v. Chapman, *supra*; see also Turner v. Safley, 482 U.S. 78, 89 (1987).

²⁷ Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986); Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982); Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), *cert. denied*, 460 U.S. 1042 (1983); Ramos v. Lamm, 639 F.2d 559, 567 n. 10 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir.), *cert. denied sub nom. Alabama v. Pugh*, 438 U.S. 915 (1978).

²⁸ See, e.g., Tillery v. Owens, 719 F.Supp. at 1309; Coniglio v. Thomas, 756 F.Supp. 409, 414 (S.D.N.Y. 1987); Wooden v. Norris, 637 F.Supp. 543, 555 (M.D.Tenn.

The courts' task under the Eighth Amendment is far from over and it is doubtful it will ever be. It is tempting to believe that the "deplorable" and "sordid" conditions revealed by many of the prison cases of the 1970s are now ancient history. That is not the case. While some unconstitutional prisons have reached and remained at constitutionally acceptable levels,²⁹ others have not.³⁰ Worse,

(footnote cont'd)

1986); Miles v. Bell, 621 F.Supp. 51, 57 (D.Conn. 1985); Ramos v. Lamm, 485 F.Supp. at 132; Pugh v. Locke, 406 F.Supp. at 328.

²⁹ There have been no reported opinions on the merits in the Mississippi prison litigation for thirteen years. See Gates v. Collier, 548 F.2d 1241 (5th Cir. 1977). In Alabama, the district court entered an order finding the system constitutional and dismissing the case in 1988. Status Report: The Courts and Prisons (January 1, 1990), in 2 Prisoners and the Law at App. B-23, B-24 (Robbins ed. 1990) ("Status Report"). In Oklahoma, conditions were found to meet Eighth Amendment standards in 1986 and the action was dismissed except for the racial discrimination claims. Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986). The Arkansas

constitutional prisons are constantly

(footnote cont'd)

prison litigation was ended in 1982 after a finding of continuing compliance. Finney v. Mabry, 546 F.Supp. 628 (E.D.Ark. 1982). Other states with prisons subject to long-standing injunctive orders in which there have been no recent substantial findings of unconstitutionality or noncompliance include Arizona, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, North Carolina, and Wyoming. Status Report, supra.

30 Tillery v. Owens, discussed above at 20-22; Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986) ("rampant" violence); Gilland v. Owens, 718 F.Supp. 665, 686-88 (W.D.Tenn. 1989) ("pervasive and constant threat of personal harm" from violence); Inmates of Occoquan v. Barry, 717 F.Supp. 854, 866-68 (D.D.C. 1989) ("dilapidated and filthy" living conditions, life-threatening fire hazards, and "systemic failures" in medical services); Fambro v. Fulton County, 713 F.Supp. 1426, 1429-31 (N.D.Ga. 1989) (health-threatening defects in medical care system, unsanitary conditions); Morales Feliciano v. Hernandez Colon, 697 F.Supp. 37, 45 (D.P.R. 1988) ("structurally unsound and vermin infested" facilities, life-threatening fire hazards, uncontrolled violence, denial of and interference with medical care).

threatened, and the gains of past years are always at risk, from the pressures of increasing populations³¹ and limited budgets.³² Indeed, it is well worth

31 The national prison population grew by 6 percent in the first half of 1990. U.S. Department of Justice, Prison Population Grows 6 Percent During First Half of Year (October 7, 1990). The National Council on Crime and Delinquency has estimated that in the twelve states that use its projection methodology, prison populations will increase by over 68 per cent by 1994. Austin and McVey, The 1989 NCCD Prison Population Forecast: The Impact of the War on Drugs, NCCD Focus (December 1989).

32 Thus, in Duran v. Anaya, 642 F.Supp. 510 (D.N.M. 1986), a statewide class action previously resolved by consent judgment, the district court was constrained several years later to enjoin proposed budget and staff cuts directed at medical care, mental health care, and security staffing. In Palmigiano v. Garahy, C.A. No. 74-172, Order (D.R.I., January 25, 1984), the defendants sought to be released from injunctive obligations based on a Special Master's report showing substantial improvement in their compliance with a 1977 injunction. The court denied the motion, citing the lack of complete compliance and the dangers posed by overcrowding. Now the defendants have lost the ground they had gained. They have been held in contempt and in "continuing contempt" based on a "record of

remembering that the dreadful conditions in the Alabama prisons arose from a historical background of failed reform. The end of the "convict lease" system in the early 20th Century was followed by the construction of numerous new facilities from the 1920s through the 1960s, but financial pressures and population growth undermined the "enlightened objectives" of state officials, leading to the

(footnote cont'd)

sordid and explosively dangerous conditions" brought about largely by worsening overcrowding. Palmigiano v. DiPrete, 737 F.Supp. 1257, 1261 (D.R.I. 1990). Other states in which significant noncompliance has been alleged or proved after a lapse of years without controversy include Kansas (1980 decree reopened in 1988, injunctive relief granted, new decree in 1989), Louisiana (case reopened in 1989, investigations pending), Michigan (contempt found in 1989), New Hampshire (contempt motion pending), and Utah (new litigation filed, restraining order issued, contempt proceedings filed in 1989). Status Report, supra n. 29.

"degenerat[ion] into unrelieved squalor" later documented in federal court litigation. L. Yackle, Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System at 10-11 (1980); see also Pugh v. Locke, supra. The Texas prisons, too, had been the beneficiaries of several decades of reform efforts at the time that they were found unconstitutional. S. Martin and S. Ekland-Olson, Texas Prisons: The Walls Came Tumbling Down at 15-25 (1987); see also Ruiz v. Estelle, supra.

For these reasons, it is essential to the maintenance of public health and human decency under our Constitution that the Court reaffirm the holding of Rhodes v. Chapman that Eighth Amendment rights are to be measured by facts in the prisons and not intentions in prison officials' minds. If the Eighth Amendment requires no more

than good intentions--or, worse, the mere absence of bad ones--it might as well not exist.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the matter remanded for further proceedings consistent with the decision in Rhodes v. Chapman.

Respectfully submitted,

/S/
JOHN BOSTON, Esq.
(Counsel of Record)
15 Park Row - 7th Floor
New York, New York 10038
Counsel for Amicus Curiae
[212] 577-3530

11
No. 89-7376

FILED
DEC 1990

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PEARLY L. WILSON,

Petitioner,

v.

RICHARD SEITER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
BRIEF OF AMICI CURIAE STATES OF MICHIGAN,
ALASKA, ARKANSAS, CALIFORNIA,
CONNECTICUT, DELAWARE, HAWAII, IDAHO,
ILLINOIS, KANSAS, KENTUCKY, MISSOURI, NEW
JERSEY, OREGON, PENNSYLVANIA, SOUTH
CAROLINA, TENNESSEE, VIRGINIA AND THE
COMMONWEALTH OF PUERTO RICO IN
SUPPORT OF RESPONDENTS

FRANK J. KELLEY
Attorney General of Michigan
GAY SECOR HARDY
Solicitor General
Council of Record
THOMAS C. NELSON
Assistant Attorney General

525 West Ottawa Street
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

(Additional counsel listed on inside cover.)

Hon. Douglas B. Bailly
Attorney General of Alaska

Hon. Ron Fields
Attorney General of Arkansas

Hon. John K. Van De Kamp
Attorney General of California

Hon. Clarine Nardi Riddle
Attorney General of Connecticut

Hon. Charles M. Oberly, III
Attorney General of Delaware

Hon. Warren Price, III
Attorney General of Hawaii

Hon. James T. Jones
Attorney General of Idaho

Hon. Neil F. Hartigan
Attorney General of Illinois

Hon. Robert T. Stephen
Attorney General of Kansas

Hon. Frederic J. Cowan
Attorney General of Kentucky

Hon. William L. Webster
Attorney General of Missouri

Hon. Robert J. Del Tufo
Attorney General of New Jersey

Hon. Dave Frohnmayer
Attorney General of Oregon

Hon. Ernest D. Preate, Jr.
Attorney General of Pennsylvania

Hon. T. Travis Medlock
Attorney General of South Carolina

Hon. Charles W. Burson
Attorney General of Tennessee

Hon. Mary Sue Terry
Attorney General of Virginia

Hon. Hector Rivera-Cruz
Attorney General of Puerto Rico
Counsel for Amicus Curiae

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
DENIAL OF A MOTION FOR SUMMARY JUDGMENT ON AN EIGHTH AMENDMENT CLAIM REQUIRES A MATERIAL DISPUTE OF FACT AS TO OBDURACY AND WANTONNESS	4
A. THE ELEMENTS OF AN EIGHTH AMENDMENT CAUSE OF ACTION SHOULD NOT DEPEND ON THE CHARACTERIZATION OF THE ALLEGED VIOLATION	7
B. THE TEXT OF THE AMENDMENT, ITS HISTORIC ORIGINS AND ITS APPLICATION IN OTHER CONTEXTS SUPPORTS A CONCLUSION THAT STATE OF MIND IS A RELEVANT ELEMENT	10
C. FACTORS PERTINENT TO A DETERMINATION OF AN EIGHTH AMENDMENT VIOLATION MAY BE RELEVANT TO BOTH INTENT AND HARM	12
D. STATE OF MIND REQUIREMENTS SHOULD NOT DEPEND ON THE RELIEF SOUGHT	16
CONCLUSION	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Abdul-Akbar v. Watson</i> 901 F.2d 329 (3rd Cir. 1990)	5
<i>Anderson v. Liberty Lobby, Inc.</i> 477 U.S. 242, 250-252 (1986)	5, 6
<i>Atiyeh v. Capps</i> 449 U.S. 1312, 1315-1316 (1981)	4
<i>Bell v. Wolfish</i> 441 U.S. 520, 554-555 (1979)	7
<i>Berry v. City of Muskogee</i> 900 F.2d 1489, 1494-1496 (10th Cir. 1990)	9
<i>Birrell v. Brown</i> 867 F.2d 956 (6th Cir. 1989)	19
<i>Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.</i> 492 U.S. ____; 109 S.Ct. 2909, 2915 (1989)	11
<i>Celotex Corp. v. Catrett</i> 477 U.S. 317, 323 (1986)	3, 5
<i>Cleavinger v. Saxner</i> 474 U.S. 193, 211 (1985)	4

TABLE OF AUTHORITIES. CONTD

<i>Cody v. Hillard</i> 830 F.2d 912 (8th Cir. 1987) (<i>en banc</i>), cert denied 485 U.S. 906 (1988)	18
<i>Cooper v. Pate</i> 378 U.S. 546 (1964)	7
<i>Edelman v. Jordan</i> 415 U.S. 651 (1974)	16, 17
<i>Estelle v. Gamble</i> 429 U.S. 97, 104 (1976)	14
<i>Ex Parte Young</i> 209 U.S. 123 (1908)	16
<i>Ford v. Wainwright</i> 477 U.S. 399, 405 (1986)	11
<i>Gelabert v. Lynaugh</i> 894 F.2d 746, 747 (5th Cir. 1990)	5
<i>Green v. Mansour</i> 474 U.S. 64, 77 (1985)	17
<i>Gregg v. Georgia</i> 428 U.S. 153, 170 n. 17 (1976)	10
<i>Haines v. Kerner</i> 404 U.S. 519, 520-521 (1972)	5
<i>Higley v. Michigan Department of Corrections</i> 835 F.2d 623 (6th Cir. 1987)	4

TABLE OF AUTHORITIES. CONT'D

<i>Holt v. Sarver</i> 309 F.Supp. 362, 381 (E.D. Ark. 1970)	13
<i>Hoptowit v. Ray</i> 682 F.2d 1237, 1246-1247 (9th Cir. 1982)	12, 18
<i>Hutto v. Finney</i> 437 U.S. 678, 681 (1978)	8, 13
<i>In Re McDonald</i> 489 U.S. 180 (1989)	5
<i>Ingraham v. Wright</i> 430 U.S. 651, 664 (1977)	10
<i>Inmates of Occuquan v. Berry</i> 844 F.2d 828, 844 (D.C. Cir. 1988)	19
<i>Inmates of Suffolk County Jail v. Eisenstadt</i> 360 F.Supp. 676, 684 (D. Mass. 1973)	13
<i>Jones v. North Carolina Prisoners' Labor Union</i> 433 U.S. 119, 132 (1977)	8
<i>LaFaut v. Smith</i> 834 F.2d 389 (4th Cir. 1987)	14
<i>Lopez v. Robinson</i> 914 F.2d 486 (4th Cir. 1990)	15
<i>Louisiana ex rel. Francis v. Resweber</i> 329 U.S. 459, 462 (1947)	11

TABLE OF AUTHORITIES. CONT'D

<i>Lujan v. National Wildlife Federation</i> 497 U.S. ____; 110 S.Ct. 3177, 3188-3189 (1990)	6
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> 475 U.S. 574, 587 (1986)	5
<i>Neitzke v. Williams</i> 490 U.S. ____; 109 S.Ct. 1827 (1989)	5
<i>Pennhurst State School and Hospital v. Halderman</i> 465 U.S. 89, 103 (1984)	4, 17
<i>Penry v. Lynaugh</i> ____ U.S. ____; 109 S.Ct. 2934, 2953 (1989)	8
<i>Powell v. Lennon</i> 914 F.2d 1459 (11th Cir. 1990)	17
<i>Procunier v. Martinez</i> 416 U.S. 396, 404-405 (1974)	7
<i>Pugh v. Locke</i> 406 F.Supp. 318, 323-324 (M.D. Ala. 1976) <i>aff'd as modified</i> , 559 F.2d 283 (5th Cir. 1977) <i>rev'd in part</i> , 438 U.S. 781 (1978)	13

TABLE OF AUTHORITIES. CONT'D

<i>Ramos v. Lamm</i> 485 F.Supp. 122, 134 (D. Colo. 1979) <i>aff'd in part and vacated and</i> <i>remanded in part on other grounds</i> 639 F.2d 559 (10th Cir.1980) <i>cert denied</i> , 450 U.S. 1041 (1981)	13
<i>Rhodes v. Chapman</i> 452 U.S. 337 (1981)	2, 4, 8, 12, 13, 14
<i>Robinson v. California</i> 320 U.S. 660 (1962)	11
<i>Santiago v. Lane</i> 894 F.2d 218, 221 (7th Cir. 1990)	9
<i>Solem v. Helm</i> 463 U.S. 277, 285, n 10 (1983)	10
<i>Street v. J.C. Bradford & Co.</i> 886 F.2d 1472, 1476-1481 (6th Cir. 1989)	5, 6
<i>Tillery v. Owens</i> 907 F.2d 418 (3rd Cir. 1990)	17
<i>Trop v. Dulles</i> 356 U.S. 86, 101 (1958)	8
<i>Turner v. Safley</i> 482 U.S. 78, 84-85 (1987)	8
<i>Walker v. Johnson</i> 771 F.2d 920, 925 (6th Cir. 1985)	12

TABLE OF AUTHORITIES. CONT'D

<i>Weems v. United States</i> 217 U.S. 349, 368-369 (1910)	10
<i>Wellman v. Faulkner</i> 715 F.2d 269 (7th Cir. 1983)	12
<i>Whitley v. Albers</i> 475 U.S. 312 (1986)	2, 14
<i>Will v. Michigan Department of State Police</i> ___ U.S. ___; 109 S.Ct. 2304, 2311 (1989)	17
<i>Williams v. Edwards</i> 547 F.2d 1206, 1213 (5th Cir. 1977)	19
<i>Youngberg v. Romeo</i> 457 U.S. 307, 323 (1982)	19

TABLE OF AUTHORITIES, CONT'DOther Authorities

Administrative Office of the United States Courts, Annual Report of the Director 181, Table C-2A (1989) 4

Eastman, *The Triumph of the Prison: The True Limits of Prison Reform Litigation* 20 U. Tol. L. Rev. 69, 96-97 (1988) 13

Eklund-Olson, *Crowding, Social Control and Prison Violence: Evidence from the Post-Ruiz Years in Texas*, 20 Law & Soc'y Rev. 389 (1986) 18

Engle and Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoner's Rights and Violence* 7 Harvard J. L. and Pub. Pol'y. 413, 430-433 (1987) 18

Gursky, *Who Are These People and Why Are They Suing You?--A Look at the ALCU's National Prison Project*, *Corrections Today*, June, 1989, at 16, 22 5

J. Thomas, *Prisoner Litigation* (1988), pp 51-65, 120 4

Pillsbury, *Understanding Penal Reform: The Dynamic of Change* 80 J. Crim. L. & Criminology 726, 772 (1989) 18

TABLE OF AUTHORITIES, CONT'D

Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach* 78 NW. U. L. Rev. 774, 794 (1983) 6

Survey: Prison Construction Booms in U.S.-- Up 73 Percent 14 Corrections Compendium, Sept Oct, 1989, at 10 18

Wefing, *Cruel and Unusual Punishment* 20 Seton Hall L. Rev. 478, 482 (1990) 11

What is Cruel and Unusual Punishment 24 Harv. L. Rev. 54, 56 (1910) 10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 89-7376

PEARLY L. WILSON,

Petitioner,

v.

RICHARD SEITER, et al.,

Respondents.

INTEREST OF AMICI

The State of Michigan and the states which have joined this Amicus Curiae brief in support of Respondents operate prison systems subject to 42 U.S.C. § 1983 actions alleging unconstitutional conditions of confinement. Many of these lawsuits are brought by inmates who proceed in forma pauperis. Defense of this litigation, much of which is meritless, absorbs considerable time and resources.

The present case involves important questions regarding the scope of the Eighth Amendment in conditions cases and the function of summary judgment as a tool for their resolution. The decision below held that Petitioner must demonstrate a material dispute concerning official obduracy and wantonness in order to justify a full trial. Affidavits or other evidence which merely placed the seriousness of the conditions or the effectiveness of remedial measures in controversy were found insufficient in this regard.

In the view of Amici the Sixth Circuit panel correctly resolved a historic anomaly in Eighth Amendment jurisprudence. Previous cases which addressed conditions claims, as opposed to individual allegations of harm attributable to specific events, had tended to ignore the state of mind element or simply collapsed it into an evaluation of severity. This case properly refocuses the inquiry on the dual elements of an Eighth Amendment violation--the nature of the deprivation and the state of mind of the causative agent.

Amici do not seek to operate inhumane correctional facilities or to purposely subject any prisoner to conditions which fall below minimal civilized standards of decency. However, they also do not believe that Eighth Amendment liability exists without fault. Where a plaintiff cannot carry a minimal burden of establishing a material dispute as to official intent, the case should not proceed to trial. Intrusive federal trials strain already limited state resources and impose additional disruption on overburdened correctional staffs. These costs are acceptable when wanton and obdurate behavior has produced the conditions at issue. They are not acceptable where the responsible state officials and agencies have made good faith efforts to maintain humane facilities.

SUMMARY OF ARGUMENT

The Court of Appeals correctly required Petitioner to demonstrate a material factual dispute as to obduracy and wantonness as a prerequisite to avoidance of summary judgment in this case. This state of mind is an element of a cause of action under the Eighth Amendment as recognized by this Court's decisions in *Rhodes v. Chapman*, 452 U.S. 337 (1981) and *Whitley v. Albers*, 475 U.S. 312 (1986). Where a defendant raises an issue in this regard

by way of motion for summary judgment, the burden properly shifts to the plaintiff to adduce sufficient evidence to require resolution by a trier of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Neither the complexity of the issue nor the nature of the relief sought in a particular case should control the elements of the underlying cause of action. The extent, duration or severity of conditions may bear on the question of whether a condition deprives inmates of basic human needs. These factors may also suggest the desirability of certain remedial measures. A request for prospective relief may also impact on the applicability of various immunity defenses. None of these considerations, however, should foreclose timely judicial inquiry into each element necessary for a determination of liability.

Nothing in the history of the Eighth Amendment suggests that it imposes liability without fault. Certainly, the amendment forbids the intentional infliction of pain without penological justification as evidenced by the circumstances surrounding its adoption. In cases where intent is not subject to dispute, focus on the nature of the punishment itself is appropriate. Such instances, however, do not suggest that courts may dispense with an inquiry into intent when examining challenges to prison conditions under the Eighth Amendment.

ARGUMENT

DENIAL OF A MOTION FOR SUMMARY JUDGMENT ON AN EIGHTH AMENDMENT CLAIM REQUIRES A MATERIAL DISPUTE OF FACT AS TO OBDURACY AND WANTONNESS.

By any gauge, prisoners as a group are "prolific litigants." *Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, J., dissenting). Federal civil rights filings by prisoners have steadily increased from approximately 6,600 in 1975 to nearly 26,000 in the year ending June 30, 1989. *Id.*; Administrative Office of the United States Courts, Annual Report of the Director 181, Table C-2A (1989). Although some observers contend that the "explosion" in prisoner litigation has slowed or leveled off in recent years, it is apparent that inmates produce a disproportionate amount of litigation. See J. Thomas, *Prisoner Litigation* (1988), pp 51-65, 120. See also *Higley v. Michigan Department of Corrections*, 835 F.2d 623 (6th Cir. 1987).

Many prisoner lawsuits are undoubtedly a response to unpleasant, or even harsh, circumstances or events. Inmates may well dispute whether their conditions of confinement meet professional correctional standards or state law. These grounds, however, are not a basis for federal constitutional intervention. *Rhodes v. Chapman*, 452 U.S. at 348 n. 13, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 103 (1984). The Eighth Amendment simply does not promise a rose garden. *Atiyeh v. Capps*, 449 U.S. 1312, 1315-1316 (1981) (Rehnquist, Circuit Justice).

Even prisoner advocates acknowledge that much of this litigation is frivolous from a constitutional

perspective.^{1/} Patently baseless or absurd claims are subject to dismissal under 28 U.S.C. § 1915(d). *Neitzke v. Williams*, 490 U.S. ___; 109 S.Ct. 1827 (1989). Complaints based on arguable legal theories may be dismissed under Fed. R. Civ. P. 12(b)(6) where it is apparent that no set of provable facts consistent with the allegations would entitle the pleader to relief.^{2/} Finally, courts possess only limited authority to place restrictions on the few recreational litigators who have demonstrably abused in forma pauperis status. See *Gelabert v. Lynaugh*, 894 F.2d 746, 747 (5th Cir. 1990) (citing *In Re McDonald*, 489 U.S. 180 (1989)); *Abdul-Akbar v. Watson*, 901 F.2d 329 (3rd Cir. 1990) (reversed denial of in forma pauperis status to prisoner who had filed forty § 1983 claims in seven years).

In this context, the role of summary judgment pursuant to Fed. R. Civ. P. 56 assumes critical importance. The "New Era"^{3/} of summary judgment recently launched by this Court requires that plaintiffs affirmatively present "evidence on which the jury could reasonably find for the plaintiff" to defeat a motion which challenges the factual basis of their claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In this regard, the moving party may not rest on the general or

1. Gursky, *Who Are These People and Why Are They Suing You?—A Look at the ALCU's National Prison Project*, *Corrections Today*, June, 1989, at 16, 22.

2. Notice pleading, liberal construction of pro se complaints, *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972), and generous allowance of amendments pursuant to Fed. R. Civ. P. 15 may affect the efficacy of these procedures.

3. A thorough analysis of the change in summary judgment practice is found in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-1481 (6th Cir. 1989).

conclusory allegations of the pleadings. *Lujan v. National Wildlife Federation*, 497 U.S. ____; 110 S.Ct. 3177, 3188-3189 (1990). Of particular importance to the present case is the notion that courts may appropriately resolve state of mind issues on summary judgment. *Street*, 886 F.2d at 1479; *Anderson*, 477 U.S. at 256-257.

The propriety of disposition by summary judgment in a given conditions of confinement case necessarily depends on the factual record before the court. Where, as Amici argue herein, intent is an element of the cause of action, plaintiff must adduce sufficient relevant evidence to create an actual, as opposed to theoretical, dispute. In this regard, Amici recognize that the function of summary judgment is to identify factual issues and not to resolve them. However, in an evaluation of defendant's entitlement to summary judgment, there is no sound basis for a distinction between state of mind and conduct.^{4/}

4. "[C]ourts, applying the summary judgment rule to state of mind issues in the same way that they would apply the rule to any factual matter, have decided quite correctly that when no factual dispute exists, summary judgment is appropriate." Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U. L. Rev. 774, 794 (1983).

A. THE ELEMENTS OF AN EIGHTH AMENDMENT CAUSE OF ACTION SHOULD NOT DEPEND ON THE CHARACTERIZATION OF THE ALLEGED VIOLATION.

Modern prisons present complex and intractable problems. *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974). Problems require solutions. Officials responsible for the operation of correctional facilities consequently make numerous decisions on a regular basis which, individually or collectively, affect the lives of both prisoners and employees. Some choices take the form of dramatic action in the face of explosive confrontations. Others deal with the most mundane aspects of everyday existence. All involve some degree of expertise and reflection. Competing priorities, time pressures and resource availability frequently complicate the decisional process.

The results of these decisions have been the subject of judicial scrutiny since this Court's decision in *Cooper v. Pate*, 378 U.S. 546 (1964). It is doubtful that many prison officials today act without some awareness of possible court intervention or review. If anything, it is more likely that many correctional decisions anticipate such review and seek to avoid it through conformity with the guidance offered by applicable case law.

As with most litigation, review of official discretion in the context of corrections is typically retrospective. This evaluation may occur years after the fact in a wholly different societal and legal environment. Only the most prescient administrator can accurately predict both the results of a particular decision and the precise legal standard by which a court might judge it.

This Court has long recognized the difficulties inherent in correctional decision making and the

limitations of hindsight judicial intervention. *Bell v. Wolfish*, 441 U.S. 520, 554-555 (1979) (citing *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 132 (1977)). The principles of judicial restraint, separation of powers and, in the case of state prisons, federalism all counsel deference to executive discretion in this regard. As stated in *Turner v. Safley*, 482 U.S. 78, 84-85 (1987):

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate prison authorities."

The present case involves allegations of substandard environmental conditions incident to confinement which Petitioner contends inflict "unnecessary and wanton" (*Rhodes*, 452 U.S. at 346) pain in violation of the Eighth Amendment. There is no claim that the state or its agents deliberately created the disputed conditions as punishment. And, as the Sixth Circuit found, Petitioner failed to counter Respondents' evidence of efforts to provide minimally decent confinement conditions. J. A. 72-73.

The position of Amici is that this litigation and similar so-called "conditions" cases are fundamentally the same as any other Eighth Amendment cause of action. There must be some departure from the "evolving standards of decency that mark the progress of a maturing society", *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Penry v. Lynaugh*, ___ U.S. ___; 109 S.Ct. 2934, 2953

(1989); which inflicts pain (harm), *Hutto v. Finney*, 437 U.S. 678 (1978) (denial of basic human needs). This deviation must be shown to have resulted from a culpable state of mind. For example, compare *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir. 1990) (equating deliberate indifference with criminal recklessness) and *Berry v. City of Muskogee*, 900 F.2d 1489, 1494-1496 (10th Cir. 1990) (gross negligence insufficient for Eighth Amendment claim)^{2/} To hold otherwise effectively imposes strict liability without fault.

Amici recognize that analysis of causation and intent issues presents difficulties in "conditions" cases. When medical personnel ignore unmistakable signs of a serious illness or where a guard beats an inmate, resolution of these questions ordinarily will pose no difficulty. But if the claim is that prisoners are at risk due to an unresponsive health care system or poorly trained guards, the answers are likely to be less obvious. The complexity of the inquiry, however, is no reason to dispense with the requirement. Courts are particularly suited to untangling intricate liability questions. And, given the deferential considerations previously mentioned, the states have a strong interest in a definitive liability determination prior to imposition of intrusive remedial measures.

5. Respondents' Brief sets forth the appropriate standard in this case.

B. THE TEXT OF THE AMENDMENT,
ITS HISTORIC ORIGINS AND ITS
APPLICATION IN OTHER
CONTEXTS SUPPORTS A
CONCLUSION THAT STATE OF
MIND IS A RELEVANT ELEMENT.

The United States argues that the intent of the Framers of the Bill of Rights and this Court's sentencing jurisprudence supports a conclusion that not all Eighth Amendment violations include a state of mind element. Brief for United States as Amicus Curiae, pp. 14-18. From this premise it is reasoned that conditions alone, at least the severe and pervasive variety, can constitute cruel and unusual punishment.

The origin of the Eighth Amendment has been discussed in a number of cases. The provision was "based directly on Art I, § 9, of the Virginia Declaration of Rights," which "adopted verbatim the language of the English Bill of Rights." *Solem v. Helm*, 463 U.S. 277, 285, n 10 (1983). The English version was intended to curb the excesses of English judges under the reign of James II. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). It received very little debate in Congress. *Weems v. United States*, 217 U.S. 349, 368-369 (1910). Ratification debates suggest that the primary concern of the draftsman involved proscriptions of "tortures" and other "barbarous" methods of punishment. *Gregg v. Georgia*, 428 U.S. 153, 170 n. 17 (1976).^{6/}

6. At the beginning of this century, whether whipping was constitutional was subject to debate. Note, *What is Cruel and Unusual Punishment*, 24 Harv. L. Rev. 54, 56 (1910).

Review of the history has led this Court to conclude that the amendment "... embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). The Court has further found a clear intent on the part of the Framers to place limits on the powers of the new government with a primary focus on the potential for abuse of its prosecutorial power. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. ___; 109 S.Ct. 2909, 2915 (1989). Aside from these general observations, however, it is difficult to discern the actual intent of the Framers. See Wefing, *Cruel and Unusual Punishment*, 20 Seton Hall L. Rev. 478, 482 (1990).

Sentencing cases provide little additional guidance. In such instances, there is no question that the state intends to impose the particular penalty at issue. Deliberative action by a legislative body defines an offense and proscribes the mode or extent of punishment. The prosecutor, as executive, exercises discretion to invoke the statute against a specific person. And, finally, the judicial process imposes the penalty after formal deliberation in accordance with due process of law. There is simply no issue as to intent in such circumstances.^{7/}

The absence of an issue does not necessarily suggest the absence of an element. Intent may not be an issue on review of the legislative prerogative related to

7. The cases cited by the United States at 18-19 of their brief support this conclusion. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947), there was simply no claim that the officials were doing anything other than trying to carry out a lawfully imposed death sentence. *Robinson v. California*, 320 U.S. 660 (1962), involved a legislative enactment which criminalized addictive status.

imposition of a particular penalty. This, however, does not foreclose intent as an element of a cause of action where volitional conduct is alleged to have violated the Eighth Amendment.

C. FACTORS PERTINENT TO A DETERMINATION OF AN EIGHTH AMENDMENT VIOLATION MAY BE RELEVANT TO BOTH INTENT AND HARM.

The parties in this case dispute whether the conditions at issue "deprive inmates of the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347. Some of the types of deprivations alleged by Petitioner are within the range of conditions (sanitation, food, shelter) that have been subjected to Eighth Amendment scrutiny by some circuits.^{8/} Commonality, however, is not equivalence. The duration, extent and severity of any given condition must be considered in determining whether the condition denies basic human needs.

The well known conditions of confinement cases commenced in the wake of *Cooper v. Pate* involved older facilities with many serious structural and administrative problems. In early landmark litigation, the prisons at

8. The Sixth Circuit below analyzed each discrete condition separately in context in accord with the test adopted in *Walker v. Johnson*, 771 F.2d 920, 925 (6th Cir. 1985). Other jurisdictions employ somewhat different formulations in conditions cases. Compare *Hoptowitz v. Ray*, 682 F.2d 1237, 1246-1247 (9th Cir. 1982) (focus on specific condition) with *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983) ("totality of conditions"). See also: Annot., 85 A.L.R. Fed. 750 (1987).

issue were described as "a dark and evil world completely alien to the free world." *Holt v. Sarver*, 309 F.Supp. 362, 381 (E.D. Ark. 1970) (*Holt II*) quoted in *Hutto v. Finney*, 437 U.S. 678, 681 (1978).^{9/} Such extremely deplorable conditions were not atypical. *Pugh v. Locke*, 406 F.Supp. 318, 323-324 (M.D. Ala. 1976) *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part*, 438 U.S. 781 (1978) (facilities wholly unfit for human habitation); *Ramos v. Lamm*, 485 F.Supp. 122, 134 (D. Colo. 1979), *aff'd in part and vacated and remanded in part on other grounds*, 639 F.2d 559 (10th Cir.1980), *cert denied*, 450 U.S. 1041 (1981) (same).

Where conditions reached the level of "soul chilling inhumanity", *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676, 684 (D. Mass. 1973) quoted in *Rhodes*, 452 U.S. at 354 (Brennan, dissenting), there was simply no issue of intent. The failure to raise an issue of intent in such extreme cases, however, does not mean that intent can never be an issue in any conditions case.

The United States argues that state of mind is simply "irrelevant" whenever general continuing conditions of confinement are adequately alleged. In short, once the condition is established to fall below minimum standards, liability follows. This argument rests on several questionable premises.

9. Not surprisingly, the defendants in *Hutto* did not dispute liability. *Rhodes*, 452 U.S. at 345 n. 11. Concessions of liability or token defenses were not uncommon as corrections officials, according to commentators, utilized the courts as alternative funding mechanisms. See Eastman, *The Triumph of the Prison: The True Limits of Prison Reform Litigation*, 20 U. Tol. L. Rev. 69, 96-97 (1988). The trial in *Pugh* concluded with an open court admission by defendant's lead counsel that the evidence, which was largely stipulated, "conclusively established aggravated and existing violations of plaintiff's Eighth Amendment rights." 406 F. Supp. at 322.

This Court's cases which discuss Eighth Amendment standards in a prison context do not distinguish conditions cases from other types of actions with respect to state of mind requirements. *Rhodes* refers to "wanton and unnecessary infliction of pain", 452 U.S. at 347. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), spoke in terms of "deliberate indifference". Finally, *Whitley v. Albers*, 475 U.S. 312, 319 (1986), unequivocally stated that:

"It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." [Emphasis added].

A contrast between general conditions which affect a group of prisoners and specific circumstances directed at individual inmates is a distinction without a difference. An environmental condition such as cold temperatures may affect a single cell, a cell block or an entire institution. For purposes of constitutional analysis, the number of individuals subject to the alleged violation should not determine the applicable standard.

The extent of an alleged violation also does not alter its basic character. A single inmate may receive substandard treatment from one member of a medical care staff. The incident might be merely an isolated event attributable to individual deficiencies or it might be an example of systemic problems such as staff shortages, or possibly a blend of both. In any event, the fundamental nature of the violation remains the same.

The facts of *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), illustrates the conceptual difficulty of distinguishing systemic problems from individual denials. In *LaFaut*, a wheelchair bound paraplegic claimed that officials denied

him adequate toilet facilities and necessary physical therapy. Such treatment may have been directed at LaFaut personally by those directly responsible for his care. On another level, however, the allegations might reflect a general official indifference to the plight of handicapped prisoners. The Fourth Circuit Court of Appeals recognized that the treatment received by LaFaut could be characterized as " ... inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both. ... " 834 F.2d at 391-392.¹⁰

The attempt to confine intent as an element to transitory or isolated incidents is also unsound. Such an approach relies on labeling as a substitute for analysis. Duration may have some relevance to the determination of whether a condition deprives inmates of basic human needs. However, the mere fact that a condition may persist over time is not dispositive of state of mind.

Lopez v. Robinson, 914 F.2d 486 (4th Cir. 1990), represents an example of these considerations. In *Lopez*, lightning struck electrical lines which supplied power to prison water pumps. Water levels fell below amounts necessary for fire suppression. As a result, the warden shut off water supplies to the cells for a 24-hour period. These circumstances clearly required the exercise of judgment to balance basic sanitation and safety concerns. The court assumed that the shut-off implicated rights to basic human needs, but found no violation in the absence of culpable conduct as a causative factor. Ignoring the state of mind shown by the warden's good faith efforts to address the problem and focusing solely on the duration

10. The court chose to apply the "deliberate indifference" definition from *Estelle* rather than the heightened "malicious and sadistic" definition adopted by *Whitley*.

of the deprivation of water is contrary to the historical focus of the Eighth Amendment.

As the *Lopez* example suggests, prisons are dynamic rather than static institutions which are subject to a variety of influences. Serious conditions may "continue" as the result of intentional choices, benign neglect, errors in judgment or malicious intent. Efforts to address nonepisodic conditions may prove ineffectual for a variety of reasons. An application of a state of mind requirement in such circumstances may mean that there is no federal court redress under the Eighth Amendment. However, such result is fundamentally no different from the denial of relief for an actual injury as occurred in *Whitley*.

D. STATE OF MIND REQUIREMENTS SHOULD NOT DEPEND ON THE RELIEF SOUGHT.

Petitioner and supporting Amici claim that a state of mind requirement for continuing Eighth Amendment violations would frustrate the exception to the Eleventh Amendment immunity permitting official capacity suits for prospective injunctive relief. *Ex Parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974).

The apparent premise of this argument is that "systemic deprivations" usually develop slowly over time and result from a web of policy choices primarily related to resource allocation. See Brief of United States, at 13, 18-19. It further assumes that the conduct of officials currently responsible for the operation of the penal facility at issue did not necessarily produce the deficient condition and their state of mind, therefore, is irrelevant.

The simplistic nature of this argument tends to gloss over some important concepts. The only reason that plaintiffs can maintain official capacity actions for

injunctive relief is due to the *Ex Parte Young* fiction which effectively permits suits against the state despite the stricture of the Eleventh Amendment. *Will v. Michigan Department of State Police*, ___ U.S. ___, 109 S.Ct. 2304, 2311 (1989). The prospective relief, however, remedies continuing violations not past wrongs. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst*, 465 U.S. at 103. As summarized by Justice Brennan's dissent in *Green v. Mansour*, 474 U.S. 64, 71 (1985):

"If relief is sought against continuing violations, the Court finds that the Supremacy Clause outweighs the Eleventh Amendment; but if relief is requested against past violations, the Court determines that the Eleventh Amendment outweighs the Supremacy Clause."

Thus, whatever the historical origins of the conditions at issue, the relevant official conduct in an Eighth Amendment injunctive case is that which continues to subject the prisoners to the alleged deprivation.

The United States recognizes that past behavior, in any event, may have been merely negligent or even simply poor judgment. One could even trace the origins of some conditions to very remote, arguably neutral factors.¹¹ The current explosion of prison populations, see *Tillery v. Owens*, 907 F.2d 418 (3rd Cir. 1990), is perhaps attributable partly to the movement to determinative sentences, stricter enforcement of various crimes or simply

11. *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), illustrates the limited relevance of past causative factors in an injunctive case. The court in *Powell* reversed a dismissal of a § 1983 action which claimed that defendants had forced the plaintiff to live in a dormitory contaminated with friable asbestos. The court found that the complaint stated a claim even if the initial conduct in ordering inadequate asbestos removal was merely negligent. Though not discussed by the Court, the obvious original cause for the condition was the initial decision to install asbestos.

a surge in criminal behavior.^{12/} The search for an ultimate cause is not the proper focus of an Eighth Amendment action in which present conduct is at issue.

The immediate or proximate cause of the alleged violation was the crucial factor in *Cody v. Hillard*, 830 F.2d 912 (8th Cir. 1987) (en banc), *cert denied*, 485 U.S. 906 (1988). There the court reversed a panel decision which had upheld injunctive relief based on a finding that double celling was unconstitutional. The court's opinion emphasized that the plaintiffs had failed to demonstrate a causal connection between the use of double celling and the alleged harmful conditions. Though not dispositive, *Cody* also stressed that administrators had taken "sincere efforts" to maintain a healthful environment.

As in *Cody*, the perceived need to correct undesirable conditions cannot be allowed to dispense with the legal prerequisites for a finding of constitutional liability. Prison reform is an executive and legislative responsibility whereas the function of a court is to determine whether a constitutional violation has occurred. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (1982). However noble the goal, courts should refrain from intervention unless all the elements of proof are present.^{13/} Judges, as the court in

12. Overcrowding has been part of American penology since the nation turned to incarceration as its primary criminal penalty according to one commentator. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. Crim. L. & Criminology 726, 772 (1989). Recent expenditure indicates that States have responded affirmatively to current population pressures. See *Survey: Prison Construction Booms in U.S.—Up 73 Percent*, 14 Corrections Compendium, Sept Oct, 1989, at 10.

13. As some commentators suggest, federal court remedies do not always produce positive results. See Engle and Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoner's Rights and Violence*, 7 Harvard J. L. and Pub. Pol'y., 413, 430-433 (1987); Ekland-Olson, *Crowding, Social Control and Prison Violence: Evidence*

Inmates of Occuquan v. Berry, 844 F.2d 828, 844 (D.C. Cir. 1988), cautioned, should:

"... not be quick to presume that the two other branches will cavalierly succumb to engaging in what the lower courts have been, at times, rather quick to condemn as systemic constitutional violations." [Emphasis in original].

A state of mind requirement, despite implicit arguments to the contrary, would not necessarily allow administrators to escape liability simply by asserting a lack of resources. There is some authority for the proposition that budgetary constraints may entitle individual defendants to qualified immunity in Eighth Amendment damage actions. See *Birrell v. Brown*, 867 F.2d 956 (6th Cir. 1989), citing *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). *Birrell*, however, noted that lack of funds does not excuse constitutional violations or bar prospective remedies. *Id.* at 959 (citing *Williams v. Edwards*, 547 F.2d 1206, 1213 (5th Cir. 1977) (lack of funds or authority over funds does not justify operation of a prison in an unconstitutional manner)). The existence *vel non* of this defense is separate from whether obduracy and wantonness is an element of a cause of action. The latter is concerned with the conduct and behavior of the responsible officials in addressing the conditions at hand and, as noted, not with the precedent initial cause.

For the above reasons, Amici contend that the element of intent should not depend on the nature of the relief sought. If officials have addressed current conditions in good faith, federal courts should not intervene with intrusive remedies. To do so effectively substitutes judicial judgment as to the most efficacious manner of proceeding with prison management.

from the *Post-Ruiz Years in Texas*, 20 Law & Soc'y Rev. 389 (1986).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General of Michigan

GAY SECOR HARDY
Solicitor General
Counsel of Record

THOMAS C. NELSON
Assistant Attorney General

525 West Ottawa Street
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Hon. Douglas B. Baily
Attorney General of Alaska

Hon. Ron Fields
Attorney General of Arkansas

Hon. John K. Van De Kamp
Attorney General of California

Hon. Clarine Nardi Riddle
Attorney General of Connecticut

Hon. Charles M. Oberly, III
Attorney General of Delaware

Hon. Warren Price, III
Attorney General of Hawaii

Hon. James T. Jones
Attorney General of Idaho

Hon. Neil F. Hartigan
Attorney General of Illinois

Hon. Robert T. Stephen
Attorney General of Kansas

Hon. Frederic J. Cowan
Attorney General of Kentucky

Hon. William L. Webster
Attorney General of Missouri

Hon. Robert J. Del Tufo
Attorney General of New Jersey

Hon. Dave Frohnmayer
Attorney General of Oregon

Hon. Ernest D. Preate, Jr.
Attorney General of Pennsylvania

Hon. T. Travis Medlock
Attorney General of South Carolina

Hon. Charles W. Burson
Attorney General of Tennessee

Hon. Mary Sue Terry
Attorney General of Virginia

Hon. Hector Rivera-Cruz
Attorney General of Puerto Rico

Counsel for Amicus Curiae

39-7376

RECEIVED
HAND DELIVERED

MAY 2 - 1980

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

(2)

PEARLY L. WILSON,

Petitioner,

vs.

RICHARD SEITER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELIZABETH ALEXANDER
(Counsel of Record)
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1616 P Street N.W., Suite 340
Washington, DC 20036
(202) 331-0500

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216) 781-6278

(9)
24pt

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in failing to follow the holdings of the Fourth, Fifth, and District of Columbia Circuits that the malicious and sadistic intent requirements of Whitley v. Albers, 475 U.S. 312 (1986) do not apply to Eighth Amendment challenges to continuing conditions of confinement that do not involve the use of force.
2. Whether the Sixth Circuit erred in affirming the trial court's grant of summary judgment in view of the factual conflicts in the record.

LIST OF PARTIES

The petitioner Pearly L. Wilson is a prisoner at the Hocking Correctional Facility (hereafter HCF) in Nelsonville, Ohio. Everett Hunt, Jr., a second plaintiff in the lower courts, is no longer confined at the HCF. The respondents are Richard P. Seiter, Director of the Ohio Department of Rehabilitation and Corrections in Columbus, Ohio, and Carl Humphreys, Superintendent of the HCF.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	14
I. THE DECISION OF THE SIXTH CIRCUIT CREATES AN IMPORTANT CONFLICT WITH THE FOURTH, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS.....	14
II. THE DECISION OF THE SIXTH CIRCUIT MISAPPLIES THIS COURT'S DECISION IN <u>WHITLEY V. ALBERS</u>	25

TABLE OF AUTHORITIES

Cases

City of Canton, Ohio v. Harris, 109 S.Ct. 1197(1989).....	29
Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988), <u>cert.</u> <u>denied</u> , 109 S.Ct. 68 (1988).....	23, 24
Davidson v. Cannon, 474 U.S. 344 (1986).....	30
Estelle v. Gamble, 429 U.S. 97 (1976).....	25, 26, 30, 35
Foulds v. Corley, 833 F.2d 52 (5th Cir. 1987).....	16, 17
Gillespie v. Crawford, 833 F.2d 47 (5th Cir. 1987).....	18
Gillespie v. Crawford, 858 F.2d 1101 (5th Cir. 1988) (en banc).....	19
Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982).....	31, 32
Howard v. Adkison, 887 F.2d 134 (8th Cir. 1989).....	22
Hutto v. Finney, 437 U.S. 678 (1978).....	34
Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979), on remand, 487 F.Supp. 638 (W.D. Pa. 1980).....	32
LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987).....	19, 20, 21
Morgan v. District of Columbia 824 F.2d 1049 (D.C. Cir. 1987).....	21, 22

Noll v. Carlson, 809 F.2d 1446 (9th Cir. 1987).....	24
Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), <u>cert. denied</u> , 450 U.S. 1041 (1981).....	31
Rhodes v. Chapman, 452 U.S. 337 (1981).....	28, 34, 36
Smith v. Wade, 461 U.S. 30 (1983)....	29, 30
Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977).....	32
Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983).....	31
Whitley v. Albers, 475 U.S. 312 (1986).....	passim
Wolff v. McDonnell, 418 U.S. 539 (1974).....	36, 37
Wood v. Strickland, 420 U.S. 308 (1975).....	27

State Statutes

28 U.S.C. §1254(1).....	1
28 U.S.C. §1343.....	2, 3, 4
42 U.S.C. §1983.....	2, 4

Constitutional Provisions

U.S. Constitution, Eighth Amendment.....	passim
---	--------

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit entered on January 16, 1990, is reported at 893 F.2d 861 and is reprinted in the appendix separately filed (hereafter "App."). The unreported trial court opinion is also reprinted in the Appendix.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were issued on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia, Circuit Justice for the Sixth Circuit, granted an application to extend the time of filing this petition for writ of certiorari until May 2, 1990. App. at 21. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of state law,

statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

This action was filed by the petitioner and another prisoner, acting without counsel, in 1986.¹ The amended complaint alleged that prisoners were double bunked in dormitories at the HCF with less than fifty square feet per person; that noise levels were excessive; that the dormitory was "nearly frigid" in the winter and that the clothing provided was inadequate to keep prisoners warm. The amended complaint also claimed that temperatures were excessively high in the summer because of a lack of ventilation, resulting in prisoners experiencing heat-related rashes and prisoners with respiratory problems experiencing difficulty breathing. The complaint further stated that the restrooms were dirty and slippery, and retained offensive odors and that the food

¹ The trial court had jurisdiction of the complaint pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343.

services were a serious threat to the well-being of the prisoners because of inadequate sanitation, ventilation and sewage drainage. In addition, the complaint alleged that the presence of physically and mentally ill prisoners in the dormitories created a dangerous and stressful environment and that classification was not based on the factors provided by regulation. The prisoner plaintiffs requested injunctive and declaratory relief, as well as damages.

The parties filed cross-motions for summary judgment with supporting affidavits.² Although the opinion of the Sixth Circuit ultimately turned on a state of mind question not directly related to the actual conditions at HCF, petitioner summarizes the parties' affidavits below in order to demonstrate that

² The petitioner did not cross-appeal the denial of his motion for summary judgment.

the record presents a factual conflict.³

³ The petitioner has reorganized the allegations of the affidavits and countering affidavits to clarify the parties' allegations. The unrepresented petitioner submitted seven affidavits from prisoners living in the dormitory. These affidavits were countered by several affidavits from staff and a visitor to the HCF.

Ventilation

Petitioner's Allegations

The air is stagnant and foul from toilets, urinals and colostomy bags in the dormitory. It is difficult to sleep at night because of this foul air. In summer, the temperature goes up to 95°, and this heat is compounded by the lack of ventilation and the fact that fire exits are locked at all times. The fans in the dormitories are inadequate to move the foul air out of the dormitory. As a result of the heat some prisoners "[fall] out." Prisoners with respiratory problems have trouble breathing; other prisoners develop heat rash.

Respondents' Allegations

The dormitories contain two large exhaust fans to increase ventilation and keep down the heat in summer. The majority of the windows are in working order, and they are opened in summer. No prisoners have been overcome by heat.

(continued...)

³(...continued)

Sanitation

Petitioner's Allegations

Urine accumulates around the toilets and urinals and is inadequately cleaned, resulting in offensive odor; floors are filthy because of a lack of proper cleaning supplies. The dormitory is infested with a variety of insects and mice, and extermination is totally inadequate. The dining hall is filthy and the food is prepared by diseased, unsupervised prisoners. As a result, petitioner fears to eat in the dining hall.

Respondents' Allegations

The restrooms are completely cleaned twice a day, and throughout the day as necessary. The kitchen area and dining room are cleaned after every meal and kept very clean. Prisoner food workers are required to wear hats and plastic gloves. HCF has contracted with an exterminator which services the facility twice a month. There have been no known cases of food poisoning.

Overcrowding

Petitioner's Allegations

There are 143 beds in the dormitory; all but twenty eight of the beds are double bunked. Prisoners have less than 50 square feet per person. The beds are spaced so closely that, with the inadequate ventilation, prisoners smell the body odors of other prisoners. The general noise level is high, even during sleeping hours.

(continued...)

³(...continued)

Respondents' Allegations

The amount of storage space "appears to be adequate" for most prisoners. There are regulations to control noise. Prisoners have a variety of activities available to them, including television, exercise in the gymnasium or yard, a pool table, a weight room, a prison library, and continuing education classes that involve approximately 100 prisoners.

Lack of Heat

Petitioner's Allegations

The dormitory is "frigid" in winter. There are cracks in the walls that can be seen through. Most of the windows cannot be closed completely, so that some bunks get wet during the rain. The clothing is ragged and inadequate to keep prisoners warm in winter; no underwear is distributed.

Respondents' Allegations

The dormitories are adequately heated. Prisoners are not given special winter clothes unless they have jobs that require them to work outside, but they are permitted to buy clothing such as winter underwear. Prisoners are given an extra blanket in winter.

(continued...)

Ultimately, the issue that the Sixth Circuit considered critical to the case was the respondents' state of mind. On this issue, petitioner contended in his affidavit

³(...continued)

Safety and Protection from Communicable Diseases

Petitioner's Allegations

Psychotic prisoners are placed in the dormitories. This causes stress to other prisoners, who cannot predict the behavior of the mentally ill prisoners. Following surgery, prisoners with open sores are housed in the dormitory because of a lack of space in the prison infirmary. One named prisoner housed in the dormitory was repeatedly hospitalized for pneumonia.

Respondents' Allegations

Prisoners with mental problems are sent from HCF to other facilities. Some prisoners have age-related physical health problems. There is an initial medical screening that includes checking prisoners for infectious diseases such as tuberculosis and hepatitis. Based on the health screening there are no prisoners at HCF with active contagious diseases. There has been no outbreak of contagious diseases at HCF since it was converted to a prison four years earlier. The number of illnesses such as colds is normal in view of the relatively advanced age of the population.

that he had forwarded a three-page letter complaining of the conditions of confinement to the two respondents on July 6, 1986.⁴ Respondent Seiter, petitioner alleged, never responded to that letter. Respondent Humphreys responded but, according to petitioner, failed to take any action to correct the violations other than to forward a copy of the letter to the HCF unit manager and his staff. Petitioner alleged that the Unit Manager and his staff did not take any action to remedy the conditions and that, in fact, they had no power to do so.

Respondents' alleged attempts to remedy conditions included such matters as the regulations to control noise, the employment of an exterminator, the installation of the two fans, and the provisions for cleaning the

⁴ The affidavit was submitted as part of petitioner's motion for summary judgment, which was filed on November 10, 1986.

dormitory and food service areas.⁵

The trial court granted the respondents' motion for summary judgment on the ground that the prisoners' affidavits did not demonstrate obduracy and wantonness on the part of the prison officials. In granting summary judgment on the claims of lack of sanitation and ventilation, and housing the petitioner with prisoners with communicable diseases, the trial court relied on the factual allegations in the affidavits of the respondents. App. at 20.

Petitioner appealed to the Sixth Circuit.⁶ The court held that petitioner's affidavits were more than colorable and that several

⁵ See respondents' allegations in n.3, supra.

⁶ Petitioner continued to proceed pro se until the Sixth Circuit appointed counsel. The counsel indicated in the published opinion withdrew prior to briefing and argument because of the discovery of a conflict of interest. The subsequently-appointed counsel withdrew after the decision of the Sixth Circuit.

circuits had found Eighth Amendment violations arising from conditions similar to those alleged by the petitioner. App. at 5. Accordingly, the court held that to the extent that the district judge had adopted the factual allegations in the respondents' affidavits to find that conditions at the HCP did not violate the Eighth Amendment, the district court committed error. App. at 5-6.

Nonetheless, the Sixth Circuit held that the allegations of mixing mentally ill prisoners with others in the dormitory, the allegations of excessive heat, and the allegations of overcrowding did not rise to a constitutional level. With respect to the other claims, the Sixth Circuit held that the respondents' state of mind was the critical issue, as evidenced by respondents' allegations suggesting an attempt to improve conditions. As to these latter allegations, the Sixth Circuit stated that:

At least in this circuit, the Whitley [v. Albers, 475 U.S. 312 (1986)] standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.

App. at 10.

Although the Sixth Circuit noted that state of mind is typically not a proper issue for resolution on summary judgment, it held that petitioner's affidavits raised no genuine issue as to the respondents' state of mind. Because the petitioner did not directly dispute the respondents' claims of affirmative efforts to improve conditions, the respondents could not be acting with "obduracy and wantonness...marked by persistent malicious cruelty." App. at 11-12. Accordingly the Sixth Circuit affirmed the trial court's grant of summary judgment.

The judgment of the Sixth Circuit was entered on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia granted

petitioner's application for an extension of time to file a petition for writ of certiorari to May 2, 1990. App. at 21.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT CREATES AN IMPORTANT CONFLICT WITH THE FOURTH, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS

In this case, as noted in the Statement of the Case, the Sixth Circuit found that the affidavits filed in the trial court on behalf of petitioner were "more than colorable" and that several circuits had found Eighth Amendment violations arising from conditions similar to those alleged by the petitioner. App. at 5. For that reason, the Sixth Circuit indicated, the trial court had erred in dismissing the complaint on the basis of controverted claims in affidavits filed on behalf of respondents.

Nonetheless, the Sixth Circuit held, the petitioner's allegations regarding unsanitary eating conditions, housing with physically ill inmates, inadequate ventilation,

excessive noise, and vermin infestation could not survive summary judgment. The Sixth Circuit held that the affidavits of respondents, indicating that they had attempted to remedy these conditions, demonstrated that respondents could not possess the state of mind consistent with a violation of the Eighth Amendment, even though petitioner disputed the results of these efforts. App. at 11-12. The Sixth Circuit, purporting to apply Whitley v. Albers, 475 U.S. 312 (1986), held that efforts to maintain decent conditions, even if unsuccessful, demonstrated that the respondents lacked an obdurate and willful state of mind "marked by persistent malicious cruelty." App. at 12.

A survey of federal Court of Appeals decisions citing Whitley demonstrates that this is the only case in which a Court of Appeals has relied upon the state of mind requirements of Whitley to dismiss a case

challenging continuing conditions not involving the use of force. In contrast, the other circuits that have considered this issue have explicitly rejected the application of the "malicious cruelty" state of mind test to such cases.

In Foulds v. Corley, 833 F.2d 52 (5th Cir. 1987), the Court of Appeals reviewed the trial court's dismissal of a prisoner's complaint as frivolous. The prisoner raised due process and Eighth Amendment claims. The latter involved allegations that the solitary confinement cell was very cold and infested with rats and that the prisoner had to sleep on the floor. The Fifth Circuit held that if the prisoner proved his Eighth Amendment allegations, he would be entitled to relief. In the course of doing so, the court explicitly rejected the analysis of the district court, which was precisely the same analysis as the Sixth Circuit employed in this case:

The district court relied on Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed. 2d 251 (1986), to require a showing that the deputies acted with malicious and sadistic intent in subjecting Foulds to the above-described conditions. This reliance was in error. Whitley involved the shooting of an inmate during a prison riot. In that setting, involving essential prison security, the Supreme Court required a showing of "malicious and sadistic intent" by prison officials to support a claim under the eighth amendment. Whitley, 475 U.S. at 320, 106 S.Ct. at 1085, 89 L.Ed.2d at 261. The facts of the instant case markedly differ. There was no imminent danger. We decline the invitation to extend the rule of Whitley to cover all prison disciplinary actions, ostensibly under the guise of achieving prison security. We do not see Whitley as the harbinger of such, see 475 U.S. at 319, 106 S.Ct. at 1084, 89 L.Ed.2d at 260 (recognizing the general "unnecessary and wanton" standard of review).

Id. at 54.

A different panel of the Fifth Circuit reached precisely the same conclusion in

reversing another dismissal of a prisoner complaint alleging that the prisoners contracted tuberculosis as a result of confinement in a dirty, overcrowded cellblock that had inadequate ventilation and lighting as well as insect infestation. In the course of reversing the trial court, the Fifth Circuit made clear that the Whitley intent requirements did not apply to continuing conditions of confinement:

But unlike "conduct that does not purport to be punishment at all" as was involved in Gamble and Whitley, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement. Prison conditions may violate the eighth amendment even if they are not imposed maliciously or with the conscious desire to inflict gratuitous pain.

Gillespie v. Crawford, 833 F.2d 47 at 50 (5th Cir. 1987). Although the Fifth Circuit en banc vacated other portions of the panel's opinion on unrelated procedural grounds, this

portion of the decision was reinstated. Gillespie v. Crawford, 858 F.2d 1101 at 1103 (5th Cir. 1988) (en banc).

In LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987), former Justice Powell, sitting by designation, found that the deprivation of basic necessities of personal hygiene to a handicapped prisoner violated the Eighth Amendment. In LaFaut, the defendant prison officials had been aware of the special hygiene needs of the prisoner and had made some belated, ineffectual attempts to respond to them. Id. at 392-393. The court held that the case could be characterized as either a conditions of confinement or a medical care case. In either event, the court held, in such circumstances Whitley required no more than a "deliberate indifference" standard, and the prison officials' conduct demonstrated the requisite deliberate indifference:

Although in Whitley v. Albers, the Court held that

the "deliberate indifference" standard does not adequately capture the importance of the competing obligations that exist in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, *id.*, 106 S.Ct. at 1085, the instant case does not involve such concerns. Whether one characterizes the treatment received by LaFaut as inhumane conditions of confinement, failure to attend to his medical needs or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in Estelle to this case. In the context of this case there is no clash between LaFaut's treatment and "equally important governmental responsibilities." Cf. Whitley v. Albers, 475 U.S. at 320, 106 S.Ct. at 1084.⁴

⁴ To the extent the district court's memorandum and order can be construed as requiring appellant to demonstrate that Hambrick "acted intentionally to deprive LaFaut of medical care," (App. at 102-03) this is erroneous.

Appellant need only show that Hambrick was deliberately indifferent to his needs, not that she affirmatively intended to deprive him of the means of satisfying his needs.

834 F.2d at 391-392.

In Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987), the court upheld a jury verdict finding that the correctional officials acted with deliberate indifference in failing to protect the plaintiff from assault by a fellow prisoner. In the course of that affirmance, the Court of Appeals analyzed Whitley and held that the jury instruction based on deliberate indifference was sufficient:

The exigencies and competing obligations facing prison officials while attempting to regain control of a riotous cellblock, which led the Court to conclude that the "deliberate indifference" standard was inadequate in Whitley, are not present in this case. The gravamen of Morgan's claim is the

District's overcrowding of the Jail; the conduct Morgan challenges is the municipality's operation of the Jail generally. In this context, unlike in the prison riot setting, there can be no legitimize concern that liability will improperly be based on "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Whitley, 106 S.Ct. at 1085. The District's practice of overcrowding has endured since at least 1971. We therefore conclude that "deliberate indifference" was the appropriate standard by which to judge the District's conduct in this case.

Id. at 1057-1058.

The First, Eighth and Ninth Circuits have also rendered decisions that, while not in direct conflict with this case, apply the deliberate indifference standard, rather than the malicious cruelty standard, to prisoner challenges to conditions of confinement.

In Howard v. Adkison, 887 F.2d 134 (8th Cir. 1989), in a decision not discussing Whitley, the Eighth Circuit applied the

deliberate indifference standard to supervisor liability to affirm a jury verdict against correctional officials based on a failure to maintain sanitation in the plaintiff's cell. The officials claimed that there was no evidence that they actually knew about the plaintiff's conditions of confinement. The Eighth Circuit, relying on earlier precedent from that circuit, held that actual knowledge was not required. Rather, the standard was more than negligence but less than malicious or actual intent. The Eighth Circuit held that the pattern of events over a period of two years in a unit supervised by the correctional officials allowed the jury to find tacit authorization or reckless disregard. The court thus upheld the jury instruction, which employed the deliberate indifference standard.

Similarly, in Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988), cert. denied, 109 S.Ct. 68 (1988) the Court

of Appeals affirmed a jury verdict finding that prison officials had acted with deliberate indifference in failing to protect the prisoners' lives in a prison characterized by "severe overcrowding (a system-wide average of twenty square feet per prisoner), squalor, maltreatment, gang warfare, killings, lack of proper medical care, failure to segregate mentally disturbed prisoners, guards unable to control entire cellblocks, and other horrors." *Id.* at 558. See also *Noll v. Carlson*, 809 F.2d 1446 at 1449, n.4 (9th Cir. 1987) (citing *Whitley* and reversing the dismissal of a *pro se* complaint because the prisoner might be able to establish that the alleged failure to protect him constituted deliberate indifference).

Because the decision of the Sixth Circuit creates a conflict among the circuits, petitioner requests that the Court grant certiorari.

II. THE DECISION OF THE SIXTH CIRCUIT MISAPPLIES THIS COURT'S DECISION IN WHITLEY V. ALBERS

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court considered the standard for determining whether a prison security measure undertaken to resolve a disturbance violates the Eighth Amendment. The Court stated that, while all Eighth Amendment violations must involve "obduracy and wantonness," these terms encompass more than one possible state of mind. When the Eighth Amendment issue involves the use of force to resolve a prison disturbance, defendants are liable only if their state of mind manifests a "malicious or sadistic" intent.

By contrast, the Court in *Whitley* indicated, in the context of prisoner medical care, the Eighth Amendment is violated if the prison official's state of mind is one of "deliberate indifference." Thus, *Whitley* reaffirmed the holding in *Estelle v. Gamble*, 429 U.S. 97 (1976) that deliberate

indifference to a prisoner's serious medical needs violates the Eighth Amendment. The Court in Whitley noted that the Estelle deliberate indifference standard was appropriate in medical care cases "because the State's responsibility to attend to the medical needs of prisoners, does not ordinarily clash with other equally important governmental responsibilities." Whitley at 320.

The decisions from the Fourth, Fifth, and District of Columbia Circuits correctly apply this Court's decision in Whitley by recognizing that Whitley formulated the Eighth Amendment standard of liability for damages in the context of an emergency involving the use of force to end a prison disturbance. Continuing prison conditions of confinement not involving the use of force differ from the situation in Whitley in several ways. First, and most obviously, the interest in avoiding second-guessing prison

officials is greatest when prison officials make decisions during an emergency. In contrast, continuing conditions of confinement allow prison officials the opportunity for reflection. Second, deference to official judgment is at its greatest when prison officials make security judgments with regard to the use of force. Where conditions of confinement are at issue, the rationale for deference is less persuasive. Finally, a prison official's state of mind in imposing a particular deprivation is more important if the issue is one of liability for damages than if the issue is whether continuing conditions should be enjoined.⁷

⁷ For similar reasons, public officials charged with violations of the Constitution enjoy a qualified good faith defense in damages but not in injunctive actions. See Wood v. Strickland, 420 U.S. 308 at 314, n.6 (1975). Here, the petitioner sought injunctive relief as well as damages, and it was particularly inappropriate to apply "malicious or sadistic intent" test to the claims for injunctive relief.

When prisoners are subjected to continuing conditions that deprive them of the basic necessities of life such as adequate food, clothing and shelter⁸, such practices rarely result from a malicious intent to inflict pain. Rather, such conditions typically result from neglect and failure to remedy obvious conditions, the textbook examples of deliberate indifference. It is inappropriate to require prisoners to prove that the state of mind of prison officials constituted malicious cruelty rather than simply deliberate indifference. Such a test for state of mind would ignore the distinction between use of force cases and medical care cases drawn in Whitley, and would also inappropriately focus judicial attention on officials' state of mind rather than on the harm caused by the challenged conditions. If a condition bad enough to violate the

⁸ See Rhodes v. Chapman, 452 U.S. 337 at 348 (1981).

Eighth Amendment continues to exist for a period of time, prison staff obviously know of its existence. If, knowing of the condition, officials do not act, they are deliberately indifferent, and a "deliberately indifferent" state of mind satisfies constitutional standards for injunctive relief. Cf. City of Canton, Ohio v. Harris, 109 S.Ct. 1197 at 1205 (1989):⁹

⁹ In Smith v. Wade, 461 U.S. 30 (1983), plaintiff complained that during a stay in administrative segregation he was placed in a cell with another prisoner who sexually assaulted him. The district judge instructed the jury that the prisoner plaintiff could recover damages if the prison staff were guilty of gross negligence or egregious failure to protect. The district judge further instructed the jury that it could award punitive damages if it found that the staff acted with reckless or callous disregard or indifference to the prisoner's rights. The Eighth Circuit affirmed a jury award for compensatory and punitive damages based on these instructions.

In this Court, the prison staff argued that the proper standard for punitive damages was "actual malicious intent." This Court held that the instructions were proper, and rejected any requirement that the plaintiff show actual malicious intent. The standard for constitutional liability was not before
(continued...)

The lower federal courts have routinely applied this Court's decision in Estelle v. Gamble, 429 U.S. 97 (1976), that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment, in a manner consistent with the above analysis. When a case focuses on continuing conditions of medical care, rather than on the factual

⁹(...continued)

the Court. Id. at 51. However, in view of the Court's holding that punitive damages required only recklessness or callous indifference, a fortiori, the Court could not have approved an actual malice standard for initial liability. Accordingly, the Sixth Circuit's decision is inconsistent with Smith v. Wade because it attempts to apply a standard for liability higher than the standard this Court has applied for punitive damages for violations of Eighth Amendment rights not involving official use of force.

See also Davidson v. Cannon, 474 U.S. 344 at 347 (1986), holding that negligence in preventing an attack by a fellow prisoner does not violate the Due Process clause and noting that the prisoner did not challenge the trial court finding that prison officials were not deliberately indifferent. Again, the Court's reference to deliberate indifference implies that a finding of deliberate indifference would have been sufficient to impose liability.

circumstances of an individual instance of alleged failure to treat, the federal courts have routinely held that systemic failures to make adequate provision for medical care, including obvious failures to provide adequate staffing or equipment, demonstrate deliberate indifference justifying injunctive relief. See, e.g., Ramos v. Lamm, 639 F.2d 559 at 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981):

In class actions challenging the entire system of health care, deliberate indifference to inmates' health needs may be shown by proving repeated examples of negligent acts which disclose a pattern of conduct by prison medical staff, or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment or procedures that the inmate population is effectively denied access to adequate medical care.

(Citations omitted) See also Wellman v. Faulkner, 715 F.2d 269 at 272 (7th Cir. 1983); Hoptowit v. Ray, 682 F.2d 1237 at 1253

(9th Cir. 1982); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979), on remand, 487 F.Supp. 638 (W.D. Pa. 1980); and Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977).

An analysis of Whitley thus demonstrates that in cases challenging continuing conditions, outside of the use of force area, meeting the "wanton and obdurate" standard to show Eighth Amendment violations requires no more than a demonstration of deliberate indifference. In turn, the existence of obvious continuing conditions intrinsically demonstrates deliberate indifference if the conditions impose sufficient harm to violate the Eighth Amendment.

In this case, the Sixth Circuit failed to apply Whitley correctly. The Sixth Circuit failed to recognize that the "obdurate and wanton" state of mind requirements of Whitley for all Eighth Amendment violations encompass both the "deliberate indifference" and the

"malicious and sadistic" intent standards. Which of the two "obdurate and wanton" state of mind requirements applies depends on the circumstances. Accordingly, the Sixth Circuit erroneously equated "obdurate and wanton" simply with "malicious and sadistic" intent. Petitioner had alleged obvious continuing conditions. The respondents, it is true, had claimed that certain remedial steps had been taken, but petitioner specifically charged that he notified the respondents about the challenged conditions, and the respondents' only action was to pass on the complaint to staff who did not act and, in fact, had no power to act. Given that the Sixth Circuit acknowledged that the conditions claimed in petitioner's affidavits were sufficiently severe to raise Eighth Amendment claims and that disputed factual issues could not be resolved on summary judgment, the court could not have resolved the case on summary judgment if it had

applied the correct standard for judging Eighth Amendment claims involving continuing conditions. Accordingly, the Sixth Circuit should have held that, because the existence of obvious continuing conditions that may violate the Eighth Amendment had been put in contention by petitioner, summary judgment was inappropriate.¹⁰ Moreover, the Sixth Circuit compounded its error by holding that

¹⁰ As noted, the Sixth Circuit dismissed the claims regarding overcrowding, excessive heat, and the mixing of the mentally ill with other prisoners in the dormitory as not alleging deprivations serious enough to violate the Eighth Amendment. This dismissal was error because the claims should have been considered as part of the overall conditions challenged in the dormitory. See Rhodes v. Chapman, 452 U.S. at 347, noting that conditions of confinement alone or in combination may deprive prisoners of the minimal civilized measure of life's necessities. See also Hutto v. Finney, 437 U.S. 678 at 687-688 (1978), affirming the trial court's conclusion that the conditions of confinement, taken as a whole, continued to violate the Eighth Amendment, and therefore justified an order that might not be appropriate if the particular order challenged were considered in isolation from the totality of conditions sought to be remedied.

the petitioner's affidavits failed to show that respondents acted with "persistent malicious cruelty." App. at 12. This holding by the Court of Appeals demonstrates that it was applying the use of force standard from Whitley, not the Estelle standard of deliberate indifference.

Since applying the use of force standard was error, this Court should grant certiorari to clarify the Eighth Amendment state of mind requirements in continuing conditions cases that do not involve the use of force. It is important for the Court to review the decision of the Sixth Circuit because the Sixth Circuit's decision has extraordinarily far-reaching implications for prison law. If this case is followed, almost all prison conditions will be shielded from review under the Eighth Amendment. For the reasons given above, continuing prison conditions do not typically result from the malicious cruelty of prison officials. When such conditions

are intrinsically bad enough to violate the Eighth Amendment, imposition of a separate state of mind requirement as a barrier to relief is inconsistent with the admonition in Rhodes v. Chapman, 452 U.S. at 352:

Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as "deplorable" and "sordid." When conditions of confinement amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights."

(Citations and footnote omitted).

Failure to reverse the Sixth Circuit decision will once again draw an iron curtain between the Constitution and the nation's prisons.¹¹

¹¹ See Wolff v. McDonnell, 418 U.S. 539 at 555-556 (1974):

But though his rights may be diminished by the needs and exigencies of the

(continued...)

Accordingly, the petitioner urges that the Court grant certiorari.

¹¹(...continued)

institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.

Respectfully submitted,

ELIZABETH ALEXANDER
(Counsel of Record)
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
1616 P Street, N.W.
Washington, D.C. 20036

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216) 781-6278

Attorneys for Petitioner

May 2, 1990

RESPONSE REQUESTED

ORIGINAL

CASE NO. 89-7376

Supreme Court, U.S.
FILED

JUN 22 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PEARLY L. WILSON,

Petitioner,

v.

RICHARD P. SEITER, ET AL.,

Respondents.

On petition For Writ of Certiorari To The
United States Curt of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General

RITA S. EPPLER
(Counsel of Record)
Chief, Federal Litigation Section
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

FREDERICK C. SCHOCH
Assistant Attorney General

Attorneys for Respondents

31/22

QUESTIONS PRESENTED

1. Whether the Sixth Circuit's application of the obduracy and wantonness standard set forth in Whitley v. Albers, 475 U.S. 312 (1986), to a prison conditions suit conflicts with the decisions of other circuits or in any way misapplies Whitley?
2. Whether the Sixth Circuit properly affirmed the grant of summary judgment to the respondents based upon the fact that there were no disputes of material fact in the record?

PARTIES

The petitioner Pearly L. Wilson is a prisoner at the Hocking Correctional Facility (hereafter HCF) in Nelsonville, Ohio. Everett Hunt, Jr., a second plaintiff in the lower courts, is no longer confined at the HCF. Respondent Richard P. Seiter is currently the former Director of the Ohio Department of Rehabilitation and Correction, and respondent Carl Humphreys is the former Superintendent of Hocking Correction Facility (hereinafter HCF)

TABLE OF CONTENTS

	PAGE(s)
QUESTIONS PRESENTED.	i
PARTIES.	ii
TABLE OF CONTENTS.	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.	1
REASONS FOR DENYING THE WRIT	
I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ANY OTHER CIRCUITS. . .	11
II. THE DECISION OF THE SIXTH CIRCUIT PROPERLY APPLIED THE OBDURACY AND WANTONNESS STANDARD SET FORTH IN <u>WHITLEY V. ALBERS</u>	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	PAGE(s)
<u>Birrell v. Brown</u> , 867 F.2d 956 (6th Cir. 1989)	11
<u>Campbell v. Garza</u> 889 F.2d 797 (8th Cir. 1989)	14, 17
<u>Cartes-Quinones v. Jimenez-Nettleship</u> 842 F.2d 556 (1st Cir. 1988)	14
<u>Cody v. Hillard</u> 830 F.2d 912 (8th Cir. 1987)	14, 17
<u>Howard v. Adkinson</u> 887 F.2d 134 (8th Cir. 1989)	14
<u>LaFaut v. Smith</u> 834 F.2d 389 (4th Cir. 1987)	14, 15
<u>McGhee v. Foltz</u> 852 F.2d 876, (6th Cir. 1988)	14
<u>Morgan v. District of Columbia</u> 824 F.2d 1049 (D.C. Cir. 1987)	15
<u>Noll v. Carlson</u> 809 F.2d 1446 (9th Cir. 1987).	15
<u>Vigliotto v. Terry</u> 873 F.2d 1201, 1203 (9th Cir. 1989)	14, 17
<u>Whitley v. Albers</u> 475 U.S. 312 (1986).	i, 8, 11, 15, 16
<u>Pearly Wilson v. George Denton, et al.</u> Case Nos. 89-3454 and 89-3978 (6th Cir. March 20, 1990).	2
<u>Pearly Wilson v. Richard Seiter, et al.,</u> 893 F.2d, 861, (6th Cir. 1990).	7, 8, 9, 12, 18

TABLE OF AUTHORITIES (Continued)

<u>STATUTES, RULES AND CONSTITUTIONAL PROVISIONS</u>	<u>PAGE(s)</u>
42 U.S.C. Section 1983	2
Rule 11, Federal Rules of Civil Procedure	2
Eighth Amendment, United States Constitution	14, 15, 17

STATEMENT OF THE CASE

Petitioner Pearly L. Wilson, an abusive inmate litigator who has been sanctioned under Rule 11, Fed. R. Civ.P., and is currently required to pay a partial filing with original actions and appeals in the Sixth Circuit due to his repeated frivolous appeals, commenced the present suit under 42 U.S.C. §1983 challenging virtually every condition of his confinement at HCF.¹ In his shotgun complaint, petitioner essentially alleged that he had been subjected to cruel and unusual punishment based upon the following conditions at HCF: overcrowding, excessive noise, inadequate storage, inadequate heating and cooling, unclean lavatories, and unsanitary eating conditions. Respondents moved to dismiss this case because neither the petitioner nor his co-plaintiff² alleged that they

¹ The imposition of Rule 11 actions was upheld by the Sixth Circuit and a partial filing fee was ordered in Pearly Wilson v. George Denton, et al., Case No. 89-3454 and 89-3978 (6th Cir. March 20, 1990), cert. denied 110 S.Ct. 2217 (May 20, 1990). In its Order, the Court of Appeals noted that petitioner had filed over 70 cases in the court of appeals since 1976 and that he had filed 24 cases in the last two years. The court stated further, "almost all of these filing have been either frivolous or premature". Respondents would note that petitioner has filed at lease four petitions for certiorari in the last year according to the Ohio Attorney General's records. Case Nos. 89-7612, 89-7161, 89-7613 and this petition.

² As noted in the List of Parties, the second plaintiff is no longer confined at HCF and is no longer purruing this case.

had suffered any injury as a result of the allegedly unconstitutional conditions. (R.E. 9). The Court overruled respondents' motion to dismiss and the parties filed cross-motions for summary judgment. (R.E. 16, 11, 18, 23).

Respondents' version of the facts is contained in affidavits attached to their memorandum contra petitioner's motion for summary judgment and in their own motion for summary judgment. (R.E. 18 and 23). First, respondents rely upon the affidavit of Homer Friend which is attached to defendants' memorandum contra to plaintiff's motion for summary judgment. (R.E. 18). Mr. Friend is the Unit Manager at HCF, and he has been employed at HCF since 1983 when it was initially opened as a prison. In his affidavit, he refutes petitioner's assertions, and shows that there is no basis in fact to support petitioner's allegations. With regard to noise in the dormitories, he points out that several measures have been taken to keep down the noise level; such as not permitting televisions in the dormitories, only permitting radios with earphones, and rules which prohibit excessive noise. He states that each inmate is given two lockers for storage, and that very few complaints have been filed about the amount of storage space.

He reviews the heating and ventilation in the dormitories, and states that the heaters have been recently serviced and are in good working order. He states that inmates are not generally given special clothes in the winter, but they are permitted to buy special clothing such as long underwear, and they are given an extra blanket. With regard to ventilation, he points out that two large exhaust fans have been installed in each dormitory to ensure proper ventilation. These fans also reduce the heat in the summer and additionally, most of the windows can be opened to aid with the heat and ventilation in the summer.

With regard to sanitation, he states that the restrooms are completely cleaned twice per day, and additionally, the porters clean the restrooms throughout each day as needed. These cleaning procedures would apply to the urinals, commodes and sinks which petitioner claims to be unsanitary. Mr. Friend next discusses the sanitary practices in the kitchen and dining area, and he notes that both areas are cleaned after every meal. He states further that there are 57 inmates who work in the kitchen and make sure that it is clean and sanitary, and he states that these areas are kept very clean. He states that HCF has contracted with an exterminator to deal with any pests in this institution. With regard to inmate hygiene among food service workers, he notes that inmates who work around food have to wear hats and plastic gloves.

Concerning the overall health environment at HCF, he states that every inmate is given a medical screening upon reception into the prison system and a second examination upon entering HCF. He notes that there have been no outbreaks of contagious disease at HCF since it became a prison in 1983. He states further that mentally ill inmates are sent to programs outside of HCF, and are not "warehoused" at HCF. Finally, he states that since there is an older population at HCF, some inmates have age-related problems, but that physically ill inmates are not "warehoused" at HCF.

Respondents also submitted the affidavit of Jerry Patton, Health Care Administrator of HCF, in which he confirmed that inmates are medically examined during their reception into the Ohio prison system. He stated further that there had been no outbreak of contagious diseases at HCF, that no inmates have been overcome by heat, and that the number of illnesses in the winter is normal. Finally, he stated that the petitioner had only been treated for routine health problems at HCF. Respondents also submitted an affidavit by the staff counsel for the Ohio Judicial Conference authenticating an article which he wrote for a newsletter in which he described the cleanliness of HCF.

The District Court granted respondents' motion for summary judgment finding that the complained of conditions did not demonstrate obduracy and wantonness on the part of prison officials. (R.E. 26). The District Court rejected the claim regarding improper classification because such matters are within the discretion of prison officials. *Id.* The District Court further rejected the claims regarding the placement of mentally ill and physically ill inmates within the population at HCF finding no evidence to support a showing that respondents acted wantonly with respect to such conditions.

The District Court discussed and rejected petitioner's sanitation and overcrowding claims as follows:

Defendants present affidavits tending to show that the restrooms are cleaned at least twice a day and precautions are taken to keep the facilities and food in as sanitary a condition as possible. It must be remembered that HCF houses 327 inmates. Measures are taken to keep noise levels to a minimum; heaters have been recently serviced and are in good working order; exhaust fans have been installed in each dormitory and most windows can be opened; kitchens and dining areas are cleaned after every meal and those who work around food are required to wear hats and gloves; HCF contracts with an exterminator to keep the institution free of vermin. Consequently, it is clear that prison officials take steps to keep HCF as clean and sanitary as possible.

Plaintiffs allege that the dormitories are overcrowded. There are two dormitories ("huge rooms with two rows of bunks about three feet apart") housing 141 and 143 inmates. However, the inmates are not confined to the dormitories during the day. Recreational facilities and a TV room are available to dormitory inmates. Although crowded (plaintiffs allege each inmate has less than 50 square feet of space), plaintiffs have not countered defendants' affidavits with evidence which would support their claim that conditions in the dormitories amount to cruel and unusual punishment.

(Id. at pp. 6-7). Based upon these findings, the District Court concluded,

In sum, the Court HOLDS that plaintiffs have been provided with at least the minimal civilized measure of life's necessities and have not been deprived of their Eighth Amendment right to be free from cruel and unusual punishment. We HOLD that HCF officials do not demonstrate obdurate or wanton behavior regarding the conditions of HCF.

Id. at p. 7

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment. The Sixth Circuit identified eight potential claims: "(1) unsanitary eating conditions; (2) inadequate heating and cooling; (3) housing with mentally ill inmates; (4) housing with physically ill inmates; (5) inadequate ventilation; (6) excessive noise; (7) insect infestation; and (8) overcrowding". Pearly Wilson v. Richard Seiter, et al., 893 F.2d, 861, 864 (6th Cir. 1990). The Court of Appeals found that three of the claims (inadequate cooling, housing with mentally ill inmates, and overcrowding) fail to allege conditions which violate the constitution. Id. at 865.

With respect to the inadequate cooling claim, the Court found that this claim was based upon petitioner's allegation that he had been occasionally exposed to temperatures of 95 degrees in the summer, and the Court of Appeals concluded that such an allegation could not support a claim of cruel and unusual punishment. Id. Concerning the housing of mentally ill inmates at HCF, the Court of Appeals noted that petitioner's claim was based solely upon subjective feelings.

With no evidence of any actual incidents of violence due to this situation, the Court of Appeals found that petitioner could not show that his fear was reasonable and consequently this claim is not actionable. Id. And with regard to the overcrowding claim, the Court of Appeals considered "all of the circumstances surrounding confinement to ascertain whether prison population density inflicts cruel and unusual punishment. . .", and rejected this claim as follows:

The record before us, undisputed by appellants, establishes that while the inmates may indeed have only 50 or so square feet of living space within their dorm, the inmates also have access during the day to a television lounge, gymnasium, yard, weight room billiards table, and library. This is not, therefore, a situation wherein the inmates allege constant exposure to overcrowding. We therefore reject any eighth amendment claim on this basis.

Id.

Turning to the remaining claims, the Court of Appeals determined that the "obduracy and wantonness" standard of Whitley v. Albers, 475 U.S. 312 (1986), applies to prison conditions suits. Id. 15 866. The Court of Appeals then examined petitioner's affidavits to determine whether those affidavits could create a material issue of fact concerning the issue of whether respondents acted with obduracy and wantonness:

The question we must address, therefore, is whether the appellants' affidavits, while not directly contradicting the appellees' affidavits, nevertheless contain facts reasonably implying the appellees acted with obduracy and wantonness.

Id. The Court of Appeals discussed the evidence on the record and concluded that petitioner had put on no evidence to show that respondents acted with obduracy and wantonness in the following passage:

Importantly, the appellants do not contend that the appellees have taken no efforts to provide them with minimally decent confinement conditions. Rather, appellants' complaints are aimed at the results of those efforts. The undisputed record indicates that the HCF unit manager has adopted specific affirmative measures to reduce noise levels, has had heaters serviced, provides inmates with an extra blanket during winter months, has installed exhaust fans for improved ventilation, requires the cleaning of lavatories and kitchen on a daily basis and has contracted with an exterminator to treat HCF for pests on a twice-monthly basis. The appellants' position apparently, is that despite these actions, prison conditions remain unacceptable.

Rhodes and its progeny made clear that confinement conditions may constitute cruel and unusual punishment only if such conditions "compose the punishment at issue". 452 U.S. at 347, 101 S.Ct. at 2399. Nothing in the appellants' affidavits implies that the appellees used confinement conditions to punish the appellants. To the contrary, the evidence shows action on the appellees' behalf to maintain decent conditions at HCF. Additionally, the Whitley standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior. At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim. See Birrell, *supra*, at 958.

Id. at 866-67. Thus, the Court of Appeals found that respondents' conduct could at most be characterized as negligent.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ANY OTHER CIRCUITS.

Petitioner contends the decision of the Sixth Circuit conflicts with the Fourth, Fifth and District of Columbia Circuits in its application of Whitley v. Albers, *supra*, to a prison conditions suit. This is simply not correct. Petitioner has mischaracterized the Sixth Circuit's decision in such a manner that it creates a conflict when in fact no conflict exists. Moreover, the Sixth Circuit's application of Whitley is consistent with decisions from the Eighth and Ninth Circuits, and it does not conflict with the various decisions cited in the petition for certiorari.

The most fundamental flaw in petitioner's argument is its mischaracterization of the Sixth Circuit decision. Petitioner argues that the Sixth Circuit applied a "malicious cruelty" test from Whitley to this prison conditions suit in contrast to decisions by other circuits in which a deliberate indifference standard was applied to conditions suits. However, the Sixth Circuit actually applied the obduracy and wantonness standard from Whitley. As stated by the Court of Appeals,

Initially, it is noteworthy that we have applied Whitley's obduracy and wantonness" standard to eighth amendment challenges to confinement conditions. In Birrell v. Brown, 867 F.2d 956 (6th Cir. 1989), we noted that "[i]n addition to producing evidence of seriously inadequate and indecent surroundings, a plaintiff must also establish that the conditions are

the result of recklessness by prison officials and not mere negligence or oversight". *Id.* at 958. The importance of this application of Whitley may be merely semantic, yet it establishes that at least in this circuit, the Whitley standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.

Having concluded that a showing of obduracy and wantonness is material to appellants' claims, the critical, and determinative, question becomes whether appellants' affidavits place this fact in issue.

893 F.2d, at 866. Thus, the Sixth Circuit applied the obduracy and wantonness standard and not a "malicious cruelty" standard as alleged by the petitioner.

Petitioner relies upon one sentence in the opinion to support his argument that the Sixth Circuit applied a "malicious cruelty" standard:

Additionally, the Whitley standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty.

893 F.2d. at 867. This sentence merely interprets the meaning of the obduracy and wantonness standard. The opinion repeatedly states that the appropriate standard is obduracy and wantonness, and one interpretive sentence does not change the standard applied throughout the decision.

Indeed, this Court's decision in Whitley clearly held that there must be a showing of obduracy and wantonness to support a claim alleging cruel and unusual punishment:

It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

475 U.S. at 319. And as this statement reflects, the obduracy and wantonness requirement does apply to conditions suits. Moreover, petitioner agrees that "all Eighth Amendment violations must involve 'obduracy and wantonness'." (Petition for a Writ of Certiorari, at p. 25). As pointed out by the petitioner, Whitley goes on to discuss particular standards within differing contexts: i.e., deliberate indifference in medical care cases and the "malicious and sadistic" standard when a prison security measure is taken in response to a prison disturbance. However, these latter standards do not supplant the requirement that there must be a showing of obduracy and wantonness. The Sixth Circuit opinion turns upon an analysis based upon the obduracy and wantonness requirement, and the cases cited by petitioner applied a more specific intent standard such as deliberate indifference. There is no conflict since under Whitley the conduct must be obdurate and wanton regardless of whatever more specific intent standard also applies. The only way that a conflict could arise would be if the Sixth Circuit had applied the "malicious and sadistic" standard. But as discussed above, that standard was not applied in the instant case.

Furthermore, other circuits have applied Whitley's obduracy and wantonness standard to conditions cases. In Cody v. Hillard, 830 F.2d. 912 (8th Cir. 1987), plaintiffs challenged double-celling at a particular prison, and the court applied Whitley's obduracy and wantonness standard:

As the District Court recognized, the prison administration is striving within the limits of available resources to restrict the amount of double-celling that must be done to accommodate the rising tide of convicted felons. This hardly reflects obduracy and wantonness 'on the part of those whose job it is to manage SD SP. [the prison at issue] See Whitley, 106 S.Ct. at 1084.

830 F.2d at 915. See Also, Campbell v. Garza, 889 F.2d, 797 (8th Cir. 1989). And in a suit by a prisoner alleging an Eighth Amendment violation based upon a search of his cell, the Ninth Circuit upheld a District Court's application of the obduracy and wantonness requirement. Vigliotto v. Terry, 873 F.2d, 1201, 1203 (9th Cir. 1989). Thus, both the Eighth and Ninth Circuits have applied Whitley in the same manner as the Sixth Circuit.

Moreover, the Sixth Circuit has applied the deliberate indifference standard to a "failure to protect" case in a very similar manner as that employed in the decisions cited by the petitioner as being in conflict with this decision. McGhee v. Foltz, 852 F.2d. 876, 881 (6th Cir. 1988). McGhee applies essentially the same approach as the following cases cited by petitioner; LaFaut v. Smith, 834 F.2d, 389 (4th

Cir. 1987)); Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987); Howard v. Adkinson, 887 F.2d 134 (8th Cir. 1989); Cartes-Quinones v. Jimenez-Nettleship, 842 F.2d. 556 (1st Cir. 1988), cert. denied, 109 S.Ct. 68 (1988); and in particular, Noll v. Carlson, 809 F.2d, 1446 (9th Cir. 1987). Consequently, should the court find a conflict between the Sixth Circuit decision and the decisions cited by the petitioner, then there is at most, only an intracircuit conflict between this decision and McGhee. A conflict within a circuit does not necessitate review by this court.

In sum, the Sixth Circuit decision herein applying the Whitley obduracy and wantonness standard to a prison conditions suit does not conflict with the decisions cited by the petitioner. Whitley required a showing of obduracy and wantonness in all Eighth Amendment suits and the Sixth Circuit properly applied this requirement. The fact that other circuits have applied a more specific intent standard such as deliberate indifference does not conflict the Sixth Circuit's analysis which is based upon the more general requirement that the conduct be obdurate and wanton. Finally, should this Court find that there is a conflict, the Sixth Circuit's own decision in McGhee v. Foltz, supra, raises the same conflict and such conflict should be resolved within the circuit through an en banc review.

II. THE DECISION OF THE SIXTH CIRCUIT PROPERLY APPLIED THE OBDURACY AND WANTONNESS STANDARD SET FORTH IN WHITLEY V. ALBERS.

In Whitley v. Albers, supra, at 319, this court specifically held that "obduracy and wantonness. . . characterize the conduct prohibited by the Cruel and Unusual Punishments Clause. . . in connection with establishing conditions of confinement. . . ." Petitioner now argues that the Sixth Circuit erred in applying this obduracy and wantonness requirement to a conditions suit. Based upon the unequivocal language of Whitley, it is clear that the Sixth Circuit did not err in its application of Whitley to the preent case.

In Whitley, this Court did note:

The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.

475 U.S. at 320. And based upon this approach, this court stated that the deliberate indifference standard was appropriate for medical claims, and that a malicious and sadistic standard applies to prison security measures undertaken to resolve a disturbance. 475 U.S. 320-321. However, Whitley was not a conditions suit and it expressed no opinion regarding a specific intent standard in conditions suits. Under these circumstances, and in the face of Whitley's

unequivocal holding that a showing of obduracy and wantonness is required in all Eighth Amendment cases including conditions suits, the Sixth Circuit did not err in applying the obduracy and wantonness standard.

Moreover, as noted above, the Sixth Circuit's application of Whitley is essentially the same as that followed in decisions in the Eighth and Ninth Circuits. Cody v. Hillard, *supra*; Campbell v. Garza, *supra*; and Vigliotto v. Terry, *supra*. These decisions show that the Sixth Circuit's approach is reasonable and certainly not unique. These decisions interpret Whitley to mean what it states, i.e., that there must be a showing of obduracy and wantonness to show cruel and unusual punishment. Petitioner is essentially asking this Court to negate its previous decision because petitioner feels that such a standard is too difficult to meet.

Respondents maintain the Sixth Circuit's approach is also correct as a matter of policy. In Whitley, this Court set forth a specific requirement that prisoners must show that prison officials acted obdurately and wantonly in order to establish a claim of cruel and unusual punishment. This requirement refocuses the inquiry in prison suits back toward the animus of prison officials which is entirely appropriate. Prison officials should not be held liable for conduct which is held to be cruel and unusual unless there is a showing of obduracy and wantonness on their part. This is an appropriate standard and public policy favors such a requirement.

Finally, respondents would note that regardless of which standard applies, deliberate indifference or malicious cruelty, the result upon remand will be the same since the Sixth Circuit found that respondents' conduct was negligent at best. As stated, at the close of the lower court's opinion,

At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim.

893 F.2d. at 867. Thus, the Sixth Circuit decision did not even hinge upon which standard applied since it found respondents' conduct to be negligent at best which is far below deliberate indifference.

In sum, the Sixth Circuit correctly applied Whitley's obduracy and wantonness to this suit challenging conditions of confinement. The application of this requirement is mandated by the clear language of Whitley, and it is appropriate as a matter of policy. Petitioner's grandiose prediction that "[f]ailure to reverse the Sixth Circuit decision will once again draw an iron curtain between the Constitution and nation's prisons" (Petition for Certiorari at p. 36, footnote omitted) is patently ridiculous. The Sixth Circuit followed both the language and the intent of Whitley in the present case, and Whitley certainly did not establish any iron curtain around the American prison system. Whitley did establish that prisoners must prove that prison officials acted with obduracy


and wantonness in order to show cruel and unusual punishment,
and this requirement was properly applied by the Sixth
Circuit. This Court should uphold the Sixth Circuit by denying
this petition for certiorari.

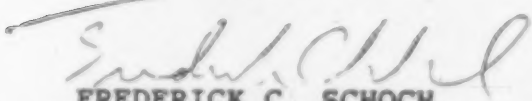
CONCLUSION

Respondents request the court to deny the petition for
certiorari.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General


RITA S. EPPLER
(Counsel of Record)
Chief, Federal Litigation Section
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414


FREDERICK C. SCHOCH
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

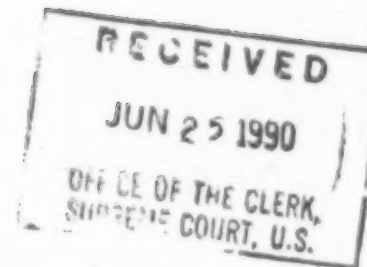
Attorneys for Respondents



Attorney General
Anthony J. Celebrezze, Jr.

June 22, 1990

Mr. Joseph Spaniol
Clerk
The United States Supreme Court
One First Street
Washington, D.C. 20543



RE: Pearly Wilson v. Richard Seiter, et al.
BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Dear Mr. Spaniol:

Enclosed is the original and 12 copies of Defendant's Brief in Opposition to Petition for Certiorari, the original and a cover sheet each of the Certificate of Service, the Affidavit of Mailing and the Notice of Appearance, in regard to the above referenced matter.

We would appreciate your filing the above listed documents, and returning the cover sheets and a copy of the brief, each time-stamped, in the enclosed self-addressed, prepaid envelope.

Thank you for your assistance in this matter.

Very truly yours,

ANTHONY J. CELEBREZZE, JR.
Attorney General

Frederick C. Schoch
FREDERICK C. SCHOCH
Assistant Attorney General
(614) 466-5414

FCS/pac
Enclosures

CASE NO. 89-7376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

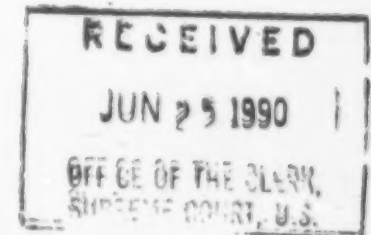
PEARLY L. WILSON,

Petitioner,

v.

RICHARD P. SEITER, ET AL.,

Respondents.



On petition For Writ of Certiorari To The
United States Court of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General

RITA S. EPPLER
(Counsel of Record)
Chief, Federal Litigation Section
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

FREDERICK C. SCHOCH
Assistant Attorney General

Attorneys for Respondents

CASE NO. 89-7376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PEARLY L. WILSON,

Petitioner,

— v. —

RICHARD P. SEITER, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOTICE OF APPEARANCE

Please take notice that Rita S. Eppler will appear as
counsel of record for Respondent in the above captioned case.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

RITA S. EPPLER
(Counsel of Record)
Chief, Federal Litigation Section
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

Fredrick C. Schoch
FREDERICK C. SCHOCH
Assistant Attorney General

Attorneys for Respondents

RECEIVED

JUN 25 1990

OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 89-7376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PEARLY L. WILSON,

Petitioner,

— v. —

RICHARD P. SEITER, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

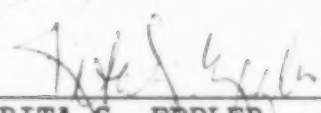
CERTIFICATE OF SERVICE

I, Rita S. Eppler, counsel of record for respondent, and a
member of the bar of the Supreme Court of the United States,
hereby certify that on the 22nd day of June, 1990, I served a
copy of Respondent's Brief in Opposition on the following
counsel of record by mailing such copy in a duly addressed
envelope, with first-class postage prepaid, to:

ELIZABETH ALEXANDER
(Counsel of Record)
National Prison Project
Liberties Union
Foundation
1616 P Street, N.W.
Washington, D.C. 20036

GORDON J. BEGGS
ACLU of Ohio Foundation
1223 West 6th Street
Cleveland, Ohio 44113

I further certify that all parties required to be served
have been served.



RITA S. EPPLER
Counsel of Record

W
DISTRIBUTED
JUL 10 1990

ORIGINAL

No. 89-7376 (4)

RECEIVED
HAND DELIVERED

JUL 9 - 1990

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PEARLY L. WILSON,

Petitioner,

vs.

RICHARD SEITER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1616 P Street N.W., Suite 340
Washington, DC 20036
(202) 331-0500

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216) 781-6278

SL 4 PAGE 1 2

9

12/14

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
--------------------------------	----

I. RESPONDENTS MISCHARACTERIZE THE STANDARD APPLIED BY THE SIXTH CIRCUIT	1
--	---

II. THE JUDGMENT OF THE COURT OF APPEALS CREATES A CONFLICT AMONG THE CIRCUITS . .	5
---	---

III. THE ERROR OF THE SIXTH CIRCUIT WAS NOT HARMLESS	12
---	----

TABLE OF AUTHORITIES

Cases

American Foreign Service Ass'n v. Garfinkel,
109 S.Ct. 1693 (1989) 14

Berry v. City of Muskogee
900 F.2d 1489 (10th Cir. 1990) . . . 7, 10

Birrell v. Brown
867 F.2d 956 (6th Cir. 1989) 12

C.I.R. v. Estate of Bosch
387 U.S. 456 (1967) 6

Campbell v. Grammer
889 F.2d 797 (8th Cir. 1989) 11

City of Canton, Ohio v. Harris
109 S.Ct. 1197 (1989) 14

Cody v. Hillard
830 F.2d 912 (8th Cir. 1987),
cert. denied, 485 U.S. 906 (1988) . . . 11

Dickinson v. Petroleum Conversion Corp.
338 U.S. 507 (1950) 7

Estelle v. Gamble
429 U.S. 97 (1976) 3, 9

Foulds v. Corley
833 F.2d 52 (5th Cir. 1987) 5

Gillespie v. Crawford
833 F.2d 47 (5th Cir. 1987),
judgment reinstated in relevant part
858 F.2d 1101 (5th Cir. 1988) (en banc) . 5

LaFaut v. Smith
834 F.2d 389 (4th Cir. 1987) 5

McGhee v. Foltz
852 F.2d 876 (6th Cir. 1988) 6

Morgan v. District of Columbia
824 F.2d 1049 (D.C. Cir. 1987) 5

Scarborough v. United States
431 U.S. 563 (1977) 7

Vigliotto v. Terry
873 F.2d 1201 (9th Cir. 1989) 12

Whitley v. Albers
475 U.S. 312 (1986) passim

Statutes

42 U.S.C. sec. 1983 7

Constitutional Provisions

U.S. Constitution,
Eighth Amendment passim

I. RESPONDENTS MISCHARACTERIZE THE STANDARD
APPLIED BY THE SIXTH CIRCUIT

The most important point to be drawn from respondents' opposition to the petition for writ of certiorari is that the respondents decline to defend the decision of the Sixth Circuit on its own terms. The respondents make no argument that the heightened "malicious and sadistic" intent requirement from Whitley v. Albers, 475 U.S. 312 (1986), applies to continuing conditions of confinement. If, as petitioner argues, the Sixth Circuit did apply a "malicious and sadistic" intent standard to the conditions at issue in this case, then nothing in respondents' brief supports a denial of certiorari.

Respondents' assertion that the Court of Appeals did not apply such a standard, respondents' brief at 12, is perplexing. That court stated: "[T]he Whitley standard of obduracy and wantonness requires behavior

marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior." App. at 11-12. A reasonable construction of this passage reveals that the Sixth Circuit required petitioner to show that respondents had acted with "persistent malicious cruelty." Moreover, the Sixth Circuit's focus on the state of mind of prison officials, rather than the objective conditions faced by petitioner, confirms that the court was applying the heightened "malicious and sadistic" standard from Whitley. App. at 10-11; see also Petition at 28-32.¹

Respondents devote the majority of their brief to arguing that the "obduracy and wantonness" standard of Whitley, 475 U.S. at 319, applies to petitioner's Eighth Amendment

¹ As set forth in the Petition, at 32-35, the Sixth Circuit's use of this incorrect standard led it erroneously to affirm the District Court's grant of summary judgment for respondents.

claims. However, this proposition is utterly noncontroversial--the "obduracy and wantonness" standard applies to all Eighth Amendment claims, as Whitley made clear and as petitioner has pointed out. See Petition at 25. Whitley indicates that this standard is not rigid and monolithic, but must be applied "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U.S. at 320. Thus, when a prisoner claims that his medical needs have been ignored, "obduracy and wantonness" is demonstrated if prison officials acted with "deliberate indifference." Id., quoting Estelle v. Gamble, 429 U.S. 97, 105 (1976). By contrast, "[w]here a prison security measure is undertaken to resolve a disturbance," as in Whitley, this standard is met only if prison officials used force "maliciously and sadistically for the very purpose of causing harm." Id. at 320-321, internal quotation

marks omitted.

In short, the error of the Sixth Circuit was not that it applied the "obduracy and wantonness" standard; rather, the court erred in applying the incorrect prong of that test. Although this case does not involve a prison disturbance, the Sixth Circuit applied the prison disturbance standard: it required petitioner to show that respondents had acted with "persistent malicious cruelty." App. at 12. As explained in the Petition, however, this Court's holding in Whitley requires that petitioner's claims be evaluated under the "deliberate indifference" standard. Had the Sixth Circuit applied the "deliberate indifference" test, it could not have affirmed the District Court's entry of summary judgment for respondents. Petition at 32-35.

II. THE JUDGMENT OF THE COURT OF APPEALS CREATES A CONFLICT AMONG THE CIRCUITS

In respondents' discussion of the conflict among the circuits, respondents implicitly concede that application of a "malicious and sadistic" intent standard from Whitley to continuing conditions of confinement is in conflict with the decisions petitioner cites. Respondents make no attempt to distinguish the cases petitioner cited, nor do respondents even mention the Fifth Circuit cases that conflict with the decision below.²

² Petitioner argued that the decision below was in conflict with Foulds v. Corley, 833 F.2d 52 (5th Cir. 1987); Gillespie v. Crawford, 833 F.2d 47 (5th Cir. 1987), judgment reinstated in relevant part, 858 F.2d 1101 (5th Cir. 1988) (en banc); LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987); and Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987). The respondents' brief does not even mention Foulds or Gillespie. Petitioner also argued that the reasoning in the case below was inconsistent with decisions from other circuits that applied a deliberate indifference standard to prisoner conditions of confinement claims, although petitioner did not assert the existence of a direct conflict with those cases. See Petition at 22-24.

Respondents' substantive argument that no conflict exists is based on McGhee v. Foltz, 852 F.2d 876 (6th Cir. 1988). In that case, the Sixth Circuit applied a deliberate indifference standard to a prisoner claim of failure to protect from harm. Petitioner agrees that McGhee is inconsistent with this case. The existence of an intra-circuit conflict, however, does not alter the fact that the most recent pronouncement of the Sixth Circuit is at odds with the views of at least four other circuits.³ The existence of an intra-circuit, as well as an inter-circuit, conflict argues that this Court should grant certiorari. See, e.g., C.I.R. v. Estate of Bosch, 387 U.S. 456, 457 (1967) (deciding consolidated cases from conflicting decisions of the Second Circuit while noting

³ Petitioner initially cited cases from three circuits in conflict with this decision. Since that time, another Court of Appeals has issued a decision in direct conflict with this case. See this brief at 7-10.

"a widespread conflict among the circuits"); Scarborough v. United States, 431 U.S. 563, 567 n.4 (1977) (granting certiorari "in view of the split among the circuits on this issue," and citing as one of the conflicts an apparent intra-circuit conflict); and Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950) (certiorari granted "because of this intracircuit conflict").

Moreover, since the filing of the Petition in this Court, another Court of Appeals has registered its disagreement with the analysis of the Sixth Circuit in this case. Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990), involved a damages suit under 42 U.S.C. sec. 1983 by the widow of a prisoner who had been murdered by other prisoners, allegedly as a result of the wrongful conduct of his jailers. In the course of determining the proper Eighth Amendment test to apply, the Tenth Circuit analyzed Whitley as follows:

Whitley involved a sec. 1983 suit brought by a prison inmate alleging a violation of his Eighth and Fourteenth Amendment rights when he was injured during the quelling of a prison riot. The Court held that, in the context of a prison riot, where "decisions necessarily [are] made in haste, under pressure, and frequently without the luxury of a second chance," the Eighth Amendment standard is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." [citation.] This standard, however, does not apply to every Eighth Amendment claim. Even while defining its new "malicious[] and sadistic[]" standard, the Court carefully preserved the applicability of its "deliberate indifference" standard, articulated in Estelle v. Gamble.... Other courts have accepted the Supreme Court's invitation to interpret the Whitley standard narrowly. See, e.g., Vaughan v. Ricketts, 859 F.2d 736, 741-42 (9th Cir. 1988) (digital body cavity searches, "while involving a threat to security, did not constitute an ongoing prison disturbance," and "the officers were not confronted

with an instantaneous decision whether to conduct the searches in the manner described"), cert. denied, ___ U.S. ___, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989); Stubbs v. Dudley, 849 F.2d 83, 86 (2d Cir. 1988) ("Whitley does not require that every case involving a guard's failure to protect a prisoner threatened by other prisoners be decided under a heightened standard appropriate for determining the lawfulness of using force to quell a prison riot."), cert. denied, ___ U.S. ___, 109 S.Ct. 1095, 103 L.Ed.2d 230 (1989); Foulds v. Corley, 833 F.2d 52, 54-55 (5th Cir. 1987) ("Whitley's heightened standard does not govern all actions of prison officials "ostensibly under the guise of achieving prison security").

After careful consideration, we hold that Whitley's "malicious and sadistic" standard does not apply to the facts of this case; rather, the applicable standard is the traditional "deliberate indifference" inquiry of Estelle. Unlike Whitley, here there is no danger that the deliberate indifference standard will fail to "adequately capture the importance of...competing obligations, or convey the appropriate hesitancy to critique in hindsight

decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Whitley, 475 U.S. at 327, 106 S.Ct. at 1088.

Berry, 900 F.2d at 1494-1495. The Berry court emphasized "the distinction so carefully preserved in Whitley between the malicious and sadistic standard applicable in prison riot situations and the deliberate indifference standard applicable to more ordinary prison policy decisions." Id. at 1495. See also id. at 1496 n.8 (noting "the Supreme Court's careful distinction in Whitley between riot and more ordinary circumstances").

Thus, the Tenth Circuit has joined the Fourth, Fifth, and District of Columbia Circuits in an interpretation of Whitley that conflicts directly with the view of the Sixth Circuit as expressed in this case. This Court should grant certiorari to resolve this conflict.

The other cases cited by respondents are simply not on point. Campbell v. Grammer,⁴ 889 F.2d 797 (8th Cir. 1989), involved a disturbance in which prisoners were setting fires, throwing human waste on staff members, and otherwise physically abusing the staff. A prison official had information that several prisoners were armed with knives. Id. at 800. Following this Court's guidance in Whitley, the Eighth Circuit applied the "malicious and sadistic" test to prisoners' claims that the Eighth Amendment had been violated when officials moved to restore order. Id. at 802. In Cody v. Hillard, 830 F.2d 912, 915 (8th Cir. 1987), cert. denied, 485 U.S. 906 (1988), the same circuit, sitting en banc, applied the "obduracy and wantonness" test to a claim that double-celling violated the Eighth Amendment. This is of no assistance to respondents, since

⁴ Respondents incorrectly cite this case as Campbell v. Garza.

that standard applies to all Eighth Amendment claims.

Vigliotto v. Terry, 873 F.2d 1201 (9th Cir. 1989), did not involve continuing conditions of confinement, but a single search of a single prisoner's cell. Id. at 1201-1202. Again, the Court of Appeals properly applied the Whitley "obduracy and wantonness" standard. Id. at 1203. Finally, Birrell v. Brown, 867 F.2d 956 (6th Cir. 1989), has no application to this case. There, the court stated, "[b]ecause we believe that both defendants are protected by qualified immunity, we will not discuss the eighth amendment aspects of this case." Id. at 958.

III. THE ERROR OF THE SIXTH CIRCUIT WAS NOT HARMLESS

Finally, respondents argue that the error of the Sixth Circuit was harmless, since petitioner's claims would fail even under the correct, "deliberate indifference" standard.

Respondents' brief at 18. Obviously this represents pure speculation. The Sixth Circuit's dictum that the respondents' actions amounted, at most, to negligence, App. at 12, ignores the uncontradicted affidavits submitted by petitioner to the effect that he had put respondents on actual notice of the conditions and that respondents had failed to take any action with regard to the continuing conditions.⁵ Petition at 9-10. As the Sixth Circuit noted, a number of the conditions detailed in petitioner's affidavits have been found in other cases to violate the Eighth Amendment. App. at 5. The allegations of actual notice to respondents, coupled with claims of obvious

⁵ Respondents quote extensively from the opinion of the District Court, but fail to point out that that court committed error when, on cross-motions for summary judgment, it simply adopted the findings in respondents' affidavits in the face of conflicting affidavits from petitioner. The Sixth Circuit noted that the District Court so erred. App. at 5-6.

conditions violating the Eighth Amendment, would, if proven, constitute deliberate indifference, not mere negligence. Cf. City of Canton, Ohio v. Harris, 109 S.Ct. 1197, 1209 (1989) (O'Connor, J., concurring).

However, this Court need not decide whether the conduct of respondents, if proven, would constitute negligence or deliberate indifference. Since the Sixth Circuit's erroneous choice of the "malicious and sadistic" standard may well have affected its entire view of the facts, this Court may reverse and remand to the Sixth Circuit for consideration of this issue under the proper, "deliberate indifference" standard. Cf. American Foreign Service Ass'n v. Garfinkel, 109 S.Ct. 1693, 1697 (1989) (returning remaining issue to lower court when lower court had previously analyzed issue "only in abbreviated fashion" so that this Court did not have benefit of lower court's analysis to guide resolution of the merits).

Respectfully submitted,

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1616 P Street N.W., Suite 340
Washington, DC 20036
(202)331-0500

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216)781-6278

Attorneys for Petitioner

July 9, 1990

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PEARLY L. WILSON,

Petitioner,

v.

RICHARD SEITER, et al.,

Respondents.

RECEIVED
HAND DELIVERED
JUL 9 - 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 89-737

CERTIFICATE OF SERVICE

I hereby certify that I have served by first class mail, postage prepaid, three
copies of the Petitioner's Reply Memorandum

in the above-entitled case, on the following counsel of record, this 9th
July 1989

Rita S. Eppler
Frederick C. Schoch
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, OH 43266-0410
(614) 466-5414
Counsel for Respondents

Elizabeth Alexander
National Prison Project of the
American Civil Liberties Union
Foundation
1616 P Street, N.W., Suite 340
Washington, D.C. 20036
(202) 331-0500
Counsel for Petitioner

Sworn to and subscribed before me

this 9th day of July,
1989.

William H. [Signature]
Notary Public

CASILLAS PRESS, INC.

Barbara S. [Signature]

1717 K Street, N.W.
Washington, D.C. 20036
Telephone: 223-1220

MY COMMISSION EXPIRES 7/31/93